TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. [redacted]96.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

K. P. PLOWMAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MARCH 7, 1908.

(21058)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 310.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

K. P. PLOWMAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Transcript of record.

Upon writ of error to the United States Circuit Court for the District of Idaho, Central Division.

1 In the Circuit Court of the United States within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT.

Complaint.

The United States of America, by R. V. Cozier, its attorney for the District of Idaho, acting in this behalf by direction of the Attorney-General of the said United States, brings this, its complaint, against K. P. Plowman, defendant herein, and for cause of action and suit alleges:

I.

That during all the times hereinafter mentioned the plaintiff was and is now the owner and in the possession of all those surveyed lands lying along the Payette River in township 8 N., R. 3 East, B. M., and lying along the North Fork of the Payette River in township 9 N., R. 3 E., B. M. Boise County, State of Idaho.

2 That heretofore and during the years 1899, 1900, 1901, 1902, 1903, the said defendant unlawfully and willfully entered upon said lands and unlawfully and willfully felled and cut down timber and trees then and there growing and being upon said lands aforesaid, such timber and trees then and there being the property of the plaintiff, and unlawfully and willfully took and carried away the said timber and trees from the place where cut, and unlawfully and willfully manufactured therefrom 243,000 feet of lumber of the value of $8.50 per thousand feet, and of the total value of $2,065.50; and also then and there manufactured from said timber and trees so felled and cut as aforesaid, 152,641 feet of logs of the value of $1.50 per thousand feet, and of the total value of $228.96; which said lumber and logs to the amount said, and of the value aforesaid, and then and there being the property of the plaintiff, the said defendant did then and there unlawfully and willfully convert to his own use and benefit, to the damage of the plaintiff in the sum of $2,294.46.

Wherefore, plaintiff prays judgment against the said defendant, K. P. Plowman, in the sum of $2,294.46, for costs of this action, and for execution.

R. V. COZIER,
U. S. Attorney for the District of Idaho, and Attorney for Plaintiff.

3 STATE OF IDAHO,
County of Latah, ss:

R. V. Cozier, being first duly sworn, deposes and says that he is United States attorney for the District of Idaho and attorney for the plaintiff in the above-entitled action, and that he makes this affidavit for and on behalf of the said United States; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things he believes it to be true.

R. V. COZIER.

Subscribed and sworn to before me this 2d day of December, A. D. 1903.

[SEAL.] A. L. RICHARDSON,
Clerk.

By M. COZIER,
Deputy.

(Endorsed): No. 31. In the Circuit Court of the United States within and for the District of Idaho, Central Division. The United States of America, plaintiff, vs. K. P. Plowman, defendant. Complaint. Filed Dec. 3d, 1903. A. L. Richardson, clerk. By M. Cozier, deputy. R. V. Cozier, attorney for plaintiff.

4 In the Circuit Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT. } No. ——.

Summons.

The President of the United States, to K. P. Plowman, the above-named defendant, greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Boise in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, if served within the county of Ada, in said district, or if served within any other county of said district, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof,

the plaintiff will take judgment against you for the sum of two thousand two hundred ninety-four and 46-100 ($2,294.46) dollars and costs of suit as prayed for in the plaintiff's complaint on file
5 herein, to which particular reference is hereby made, and a true copy of which is served herewith.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Moscow, in said district this 3rd day of December, 1903.

[SEAL.]

A. L. RICHARDSON,
Clerk.

By M. COZIER,
Deputy Clerk.

Defendant entered an appearance in this case by his attorney, W. E. Borah, on December 31st, 1903.

R. ROUNDS,
U. S. Marshal.

By FRANK L. STOBBS,
Deputy Marshal.

Returned this 23rd day of January, A. D. 1904.

(Endorsed:) No. 51. In the Circuit Court of the United States for the District of Idaho, Central Division. United States of America vs. K. P. Plowman. Summons. Returned and filed Jan. 23d, 1904. A. L. Richardson, clerk.

6 In the United States Circuit Court, District of Idaho, Central Division.

THE UNITED STATES, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Appearance for defendant.

To A. L. RICHARDSON, *Clerk of the Above Court:*

You will please enter the appearance of the above-named defendant and the undersigned as his attorney.

W. E. BORAH,
Rooms 1 and 2 Pioneer Building, Boise, Idaho.

(Endorsed:) No. 31. U. S. Circuit Court, Central Division, District of Idaho. The United States vs. K. P. Plowman. Appearance. Filed Dec. 31, 1903. A. L. Richardson, clerk.

7 In the Circuit Court of the United States within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Answer.

Comes now the defendant, and answering the plaintiff's complaint herein, admits, denies and alleges as follows:

1. Defendant admits that the plaintiff was and is the owner of the lands lying along the North Fork of the Payette River in T. 9 N., R. 3 E., B. M., Boise County, Idaho; admits that the plaintiff was also the owner of the lands in T. 8 N., R. 3 E., B. M., except section 16 in said township, which defendant alleges was at all times mentioned in the complaint owned by and in the possession of the State of Idaho.

2. Defendant denies that during the years 1899, 1900, 1901, 1902, and 1903, of either of said years, that he either unlawfully or willfully or wrongfully, or at all, except as hereinafter specifically stated, entered upon the lands of the plaintiff described in the com-
8 plaint herein, or that he willfully or unlawfully or wrongfully or at all did fell and cut down timber trees then and there standing or growing upon said lands or any of them, except in the manner as hereinafter specifically stated; denies that he either unlawfully or willfully or at all, except as hereinafter stated, carried away said timber trees or any timber trees so felled or cut, or that he either unlawfully or willfully manufactured therefrom 243 feet of lumber in any manner or in any quantity or of any value, except as hereinafter specifically stated, and defendant denies that said timber trees from which said lumber was manufactured was of any other or greater value than the sum of twenty-five cents per thousand feet; and this defendant denies that he unlawfully or willfully or at all converted said lumber or any part thereof to his own use or benefit except as hereinafter specifically set forth; denies that the plaintiff has been damaged in the sum of $2,294.46 or any other sum.

Defendant further answering herein and for a separate affirmative defense thereto alleges:

1. That the defendant herein is now and was at all times mentioned in the complaint a citizen of the United States and a bona fide resident of the State of Idaho.

2. That the defendant was during the years 1900, 1901 and 1902 running a sawmill and manufacturing lumber near Marsh, on
9 the Payette River, Boise County, Idaho; that during the year 1900, beginning about March 1st of that year, 1901, and 1902, and at no other time, the defendant herein entered upon the several and divers tracts of mineral land lying along and in the immediate vicinity of the Payette River, to wit, the lands described in the com-

plaint herein, said lands so entered upon being a part of the public domain of the United States; that said lands so entered upon by the defendant were and are public mineral lands of the United States, not subject to entry under existing laws except for mineral entry; that the said defendant then and there cut and caused to be cut and removed from said mineral lands a portion of the timber trees described in the complaint herein. That said trees were cut and caused to be cut by the defendant for the purpose of manufacturing the same into lumber to be thereafter used for domestic and for general agricultural, mining, and building uses in the vicinity of Marsh, Idaho, and within the general district and within the State where such timber trees were cut. That no portion of such timber trees or the lumber manufactured or to be manufactured from said timber trees has been exported or was intended for exportation from the State, and that all of the lumber which has been manufactured from said timber trees has been disposed of and consumed for general domestic, agricultural, mining, and building purposes in the vicinity where cut and within the State of Idaho, and that no portion of the same has ever been exported from the State. That at the time of the commencement of this suit more than one hundred and fifty thousand feet of timber trees described in the complaint had not been converted into lumber; that the same consisted of saw-logs, which had been cut from said timber trees; that the entire amount of lumber manufactured from timber trees cut by the defendant upon lands of the plaintiff would not exceed 150,000 feet.

3. That in cutting said timber trees the said defendant well and truly observed and caused to be observed the rules and regulations then in force and promulgated by the Secretary of the Interior for the protection of timber and of the undergrowth growing upon said land and for other purposes as provided in the act of Congress approved June 3, 1878, entitled, "An act to entitle the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes." And to that end this defendant alleges that in cutting and removing said timber trees the said defendant or his agent did not cut or remove any trees less than eight inches in diameter, and that he utilized all of the trees without committing or permitting any waste thereof. That he so disposed of the tops as to best prevent the spread of forest fires. That the disposal of said tops consisted in some instances, where the conditions and lay of the ground seemed to warrant, of cutting and piling said tops in rows, and under other conditions and in other instances in breaking and scattering the tops.

This defendant therefore alleges that the said timber trees were felled and removed, cut and disposed of by the defendant herein under and in accordance with the license and privilege extended by the above-entitled act.

Wherefore this defendant prays that the plaintiff take nothing by its complaint herein.

FREMONT WOOD, and
W. E. BORAH,
Attorneys for Defendant.

STATE OF IDAHO,
County of Ada, ss:

K. P. Plowman, being first duly sworn, deposes and says: That he is the defendant named in the foregoing answer: that he has heard read the said answer and knows the contents thereof: that the facts therein stated are true of his own knowledge, except the matters therein stated to be on information and belief, and as to those matters he believes the same to be true.

K. P. PLOWMAN.

12 Subscribed and sworn to before me this 3d day of March, 1903.

[SEAL.]

JOHN J. BLAKE,
Notary Public.

[Endorsed]: No. 31. U. S. Circuit Court, Central Division, District of Idaho. The United States *vs.* K. P. Plowman. Answer. Filed March 3, 1904. A. L. Richardson, clerk.

Plaintiff's requests.

Counsel for plaintiff requested the court to give the following instructions:

NUMBER ONE.

To justify one in cutting and removing timber from the public lands under authority of the act of June 3, 1878, it is not sufficient that the party show that the lands from which the timber was cut is in the vicinity or neighborhood of or adjacent to or adjoining lands proved or conceded to be valuable for minerals, nor is it sufficient to show that the land from which the timber was cut presents the same or similar characteristics or natural features as other lands valuable for their minerals.

The defendant must show by a preponderance of the evidence that the land from which the timber was cut was and is mineral
13 land, that is, valuable for minerals, and of such a character as not to be subject to entry under any other laws of the United States except those relating to the location, working and patenting of mining claims, and this should be made to appear by evidence of the actual discovery or production within the boundaries of the land actually cut over of minerals in sufficient quantity and of a character to make the land valuable for the mineral contained therein. (Refused.)

NUMBER TWO.

The act of June 3, 1878, under which the defendant justifies the cutting of the timber in question in this case, in defining the land from which a citizen may cut and remove timber "for building, agricultural, mining, and other domestic purposes," make use of the following language: "Being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry."

At the time of the enactment by Congress of the act of June 3, 1878, just referred to, the only lands reserved for mineral entry were those included in the descriptive words contained in section 2318, Revised Statutes of the United States, that is, "lands valuable for minerals." Hence I instruct you that it is only from lands
14 valuable for minerals that the citizens may cut and remove timber by authority of the act in question. (Refused.)

NUMBER THREE.

I further instruct you that the laws of the United States do not reserve lands from entry under other laws than those relating to entry of mineral lands, simply because such lands are, or may be, claimed and worked as mineral lands, such claim made or work done, without actual evidence of the presence in the land of mineral in sufficient paying quantities to make the land "valuable for minerals"—that is, profitable to work and extract the minerals therefrom, is sufficient to justify such cutting and removal. (Refused.)

NUMBER FOUR.

The land department of the United States has adopted the rule that if the land is more valuable for agriculture than for mining it is not mineral land, although it may contain some measure of gold and silver. That is the only practical rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of the profits that would or might result from mining under other and more favorable circumstances than those which actually existed or may be produced or expected in the ordinary course of such pursuit of adventure upon the land in question. (Refused.)

15 [Endorsed]: No. 31. U. S. Circuit Court. District of Idaho. The United States vs. K. P. Plowman. Plaintiff's requests. Filed Sept. 23d, 1905. A. L. Richardson, clerk.

Defendant's requests.

The jury are instructed that the fact that the agent of the Government may have told the defendant that he was a trespasser or that

the land was nonmineral would not of itself make the defendant a willful trespasser. The defendant would still have a right to rely upon his own investigation and information and if he did so and in good faith believed it was mineral, he would be an innocent trespasser notwithstanding the agent of the Government informed him otherwise.

The jury are instructed that any statement of a party made with a view of a compromise or to avoid litigation cannot be used against him; a party has a right to buy his peace and the law favors a settlement of claims out of court, and therefore if you find any of the statements alleged or claimed to have been made by the defendant were made with a view on his part of settling the claim out of court, you are to wholly disregard such statement in your consideration of the evidence.

16 The jury are instructed that if you should be satisfied from the evidence that the land in question from which the timber was cut was nonmineral as defined by these instructions, then it becomes necessary for you to determine what amount the defendant is liable to pay to the Government for the timber cut, and upon this question of damages you are advised that if he cut the timber in good faith believing it to be mineral land and that he had a right therefore to cut, he is only liable for the value of the timber as it stood in the trees before the cutting of the same took place. On the other hand, if you believe from the evidence that he was a willful trespasser in the sense that he knowingly and intentionally violated the law and did not believe that the land was mineral, he would be liable for the value of the timber after he had manufactured it into lumber.

You are therefore advised in this connection that the mere fact that a man violates the law and cuts timber when he ought not to do so does not establish the fact that he is a willful trespasser and make him liable for the full value of the timber after it is manufactured; for notwithstanding he may have cut timber when he ought not to have done so and has violated the law, yet if he believes at the time that the land was mineral and honestly proceeded to cut timber upon that the land was mineral and honestly proceed to cut timber

17 upon that theory, that he would only be liable for the value of the timber as it stood in the tree, notwithstanding the land proved to be nonmineral land.

[Endorsed]: No. 31. U. S. Circuit Court, District of Idaho. The United States vs. K. P. Plowman. Defendant's requests. Filed Sept. 23d, 1903. A. L. Richardson, clerk.

United States Circuit Court, Central Division, District of Idaho.

THE UNITED STATES OF AMERICA
vs.
K. P. PLOWMAN.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

G. W. PHIPPS,
Foreman.

[Endorsed]: No. 31. U. S. Circuit Court, Central Division, District of Idaho. The United States vs. K. P. Plowman. Verdict. Filed Sept. 24th, 1905. A. L. Richardson, clerk.

18 United States Circuit Court, Central Division, District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Judgment.

This action came regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the defendant.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered that the plaintiff herein take nothing by its complaint in said cause and that defendant go hence without day.

Judgment entered Sept. 24th, 1905.

Attest:

A. L. RICHARDSON,
Clerk.

19 [Endorsed]: No. 31. U. S. Circuit Court, Central Division, District of Idaho. The United States vs. K. P. Plowman. Judgment. Filed Sept. 24th, 1905. A. L. Richardson, clerk.

[Endorsed]: In the Circuit Court of the United States for the District of Idaho. United States vs. K. P. Plowman. Judgment roll No. 30. Filed Sept. 24, 1905. A. L. Richardson, clerk.

In the Circuit Court of the United States, within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Notice of intention to move for new trial.

To the clerk of the above-named court and to W. E. Borah and Wood & Wilson, attorneys for defendant:

Take notice that the plaintiff, the United States of America, intends to move the Court to vacate and set aside the verdict rendered in the above case and to grant a new trial of said cause upon the following grounds, to wit:

20 1. Insufficiency of the evidence to justify the verdict.

2. That the verdict is against law.

3. Errors in law occurring at the trial and excepted to by the plaintiff.

Said motion will be made upon a bill of exceptions hereafter to be prepared and served and upon the papers, pleadings and proceedings in said cause.

Dated September 30, 1905.

Respectfully,

N. M. RUICK.
United States Attorney for the District of Idaho and Attorney for Plaintiff.

Service of foregoing notice of intention to move for a new trial admitted this 2d day of October, 1905.

W. E. BORAH,
Attorney for Defendant.

[Endorsed]: No. 31. In the Circuit Court of the United States within and for the District of Idaho, Central Division. The United States of America, Plaintiff, vs. K. P. Plowman, Defendant. Notice of intention to move for a new trial. Filed Oct. 2d, 1905. A. L. Richardson, clerk.

21 In the Circuit Court of the United States, Central Division. District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Stipulation extending time to file bill of exceptions.

It is hereby stipulated that defendant's time for proposing amendments and filing and serving the same to plaintiff's proposed bill

of exceptions, may be extended until and including January 13th, 1906.

N. M. RUICK,
United States Attorney, Attorney for Plaintiff.
W. E. BORAH, and
FREMONT WOOD,
Attorneys for Defendant.

Order extending time.

It is hereby ordered that the time be extended in accordance with the foregoing stipulation.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 31. In the Circuit Court of the United
22 States, Central Division, District of Idaho. The United States of America, plaintiff, vs. K. P. Plowman, defendant. Stipulation and order extending time. Filed January 6, 1906. A. L. Richardson clerk.

In the Circuit Court of the United States, Central Division, District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Bill of exceptions.

Be it remembered that the above-entitled cause came on for trial before the court at the September, 1905, term thereof held at Boise, September 21, 1905, before the Honorable Jas. H. Beatty, Judge of said court and a jury. N. M. Ruick, United States Attorney, appearing on behalf of the plaintiff and W. E. Borah and Wood & Wilson appearing on behalf of the defendant, when the following proceedings were had, to wit:

M. A. MEYENDORFF, called and sworn as a witness on behalf of plaintiff, testified as follows:

23 I am a special agent of the General Land Office at Washington and was acting in that capacity in 1899 and 1900. As such I investigated an alleged trespass by K. P. Plowman in cutting timber from Government land on and along the Payette River. There was a total of 45,000 feet of lumber in the yard at the mill of Mr. Plowman, and 540 logs which scaled 108,000 feet, making altogether 153,000 feet. I had a conversation with Mr. Plowman. I told him it was a trespass; that it was not on mining ground where this timber

was cut and that the Government would claim the value of the timber or logs or lumber. And when he explained to me that everybody was cutting under the impression that they had a right to cut, I conceded to him the fact that it was an innocent trespass and accepted his proposition of settlement, which was not accepted by the Department.

On cross-examination witness testified:

I first visited the locality where the timber was cut in June, 1900. I went to Plowman's mill, remaining there over night. I made no examination of the ground. He told me he wanted to do what was right and that if it was nonmineral land he was willing to settle with the Government. From what I saw of the land from the mill and the house, I simply told him it was nonmineral land, but conceded to him that he was an innocent trespasser. I have no per-
24 sonal knowledge of the character of the ground where the timber was cut.

L. L. SHARP, sworn as a witness on behalf of plaintiff, testified:

I am a special agent of the General Land Office, and have been in the service something over four years. As such special agent I followed up the investigation begun by Special Agent Meyendorff of the trespass of K. P. Plowman, on the Payette River, and on April 13, 1903, made an examination of a timber cutting by Mr. Plowman near the junction of the forks of the Payette River where I found he had cut 152,641 feet of sawlogs. This cutting was on the west side of the North Fork of the Payette River about two miles above the junction of the North Fork and the Middle Fork and about a quarter of a mile from the river on the west side of the river on unsurveyed land on what will be township 9 north, range 3 east. Taking this cutting as a basis and using the report of Special Agent Meyendorff as to the balance, I made a report to the Commissioner. Before I made this report Mr. Plowman came into my office and freely made a statement concerning the facts in regard to the cutting, and it was this affidavit or statement made to me by him that made it unnecessary for
25 me to examine the cutting reported by Mr. Meyendorff, because he admitted the cutting there and he also admitted 90,000 feet additional. This statement was made May 17, 1903. My report, I believe, was dated May 30, 1903. The statement by Mr. Plowman was voluntary and was unsolicited by me. Mr. Plowman signed it and swore to it. I inserted this statement of Mr. Plowman in my report to the Commissioner. Later, and on the first day of July, 1903, a formal proposition of settlement was made by Mr. Plowman. Mr. L. G. Say assisted me in scaling the 152,641 feet of logs. These logs were in township 9, north of range 3 east above the mouth of the North Fork; still in the timber. The 152,641 feet is entirely independent of the 153,000 feet of lumber and logs scaled by my predecessor, Mr. Meyendorff. The 152,641 feet covers timber cut in the winter of 1902–3.

L. G. SAY, sworn as a witness for plaintiff, testified:

I have had fourteen or fifteen years' experience in the logging and lumber business and have cruised and estimated timber many times. I have also logged under contract and am somewhat familiar with the value of timber in this country. The fair stumpage value of the timber situated on townships 8 and 9 north of range 3 east, along the Payette River, I would place at $1.50 per thousand. I assisted
26 Mr. Sharp, special agent, in scaling the logs claimed to have been cut by Mr. Plowman in unsurveyed township 9 north of range 3 east. These logs scaled 152,641 feet. Those logs were of a stumpage value at the time they were scaled in 1903 of $1.00 per thousand. They would be worth $1.50 per thousand now.

On cross-examination, witness testified:

In estimating the value of stumpage I took into consideration that there were no roads to get this timber out until they should be constructed. I did not have anything to do with estimating the value of timber in township 8.

Redirect:

The logs I scaled would be worth from $1.50 to $1.75 in the forest after being cut, and taking one year with another, they would be worth about $6 per thousand at Plowman's mill. The value of the manufactured lumber I should place at $9 per thousand at the mill. I should place the same value on logs cut during 1900 as those cut during 1902-3.

Witness M. A. MEYENDORFF recalled:

This 153,000 feet of logs and lumber which I estimated and reported was cut in township 8 north of range 3 east.

Here plaintiff rests.

27 J. J. MCDONALD, sworn as a witness for defendant, testified:

I am a general grading contractor and am familiar with the country in township 9 north of range 3 east, Boise County, Idaho. I have taken observations as to the characteristics and features of the country along the North Fork of the Payette River and have taken photographs showing that country. The country is mountainous most of the way. It is not, in my opinion, in any sense an agricultural country. There are some gulches, ravines and canyons through it.

J. F. THOMPSON, sworn on behalf of defendant, testified:

I reside on the west side of the Payette River about 6 miles above Horse Shoe Bend. I am a miner and have mined in pretty near every way for about twenty years. I own property in the vicinity of where the timber cutting was done by Mr. Plowman upon the lands described in this suit. I know where the lands are that he cut

over in township 8. I do not know how far my properties are from this cutting. I am interested in two groups of claims there. One of the groups is on the west side of the Payette River and one is on the east side. I think they run through near the south side of township 8. I have been operating those mines two years and a half and have expended up to date $7,000.

28 (Here plaintiff objects to the testimony of this witness on the ground that the witness has stated he does not know how near his mining claims are to the place where Mr. Plowman cut the timber. Upon counsel for defendant stating he will later introduce evidence showing the distance, witness was permitted to testify subject to a motion to strike out.)

Witness resumes:

We sank a shaft 85 feet. Run a cross-cut in the bottom of the shaft 45 feet and have run a tunnel 650 feet towards the ledge. We have 7 and a fraction quartz claims altogether. We have had assays of values from those claims.

(Here defendant's counsel offers in evidence the certificates of assays, which are objected to by counsel for plaintiff for the same reason as hereinbefore stated, to wit, that the proximity of the mines to the timber cutting has not been shown. Which objection was overruled and exception taken.)

Witness continues:

The first assay was a sample of 300 pounds of ore sent to Murray, Utah, on January 31, 1902; contained 2 ounces of gold and 73¼ ounces of silver per ton, 42.2 per cent lead, 7 per cent copper, 42.35 per cent silica and 2 per cent iron, making a total value at that time of

29 $79.52 a ton. Another one made by the Anaconda Copper Company in May, 1903, gave a value of $215.29. Another one by the same company April 23, 1903, $165.12. Another one by another assayer, same month, $134.75. Another in the same month showed 107 ounces silver and 61.31 lead. Another one in June, 1903, showed $82.86 and on the same date another sample by the same assayer showed $239.32. There are lots of other locations in the immediate vicinity of my mine. Mr. James Phillips and Mr. I. A. Dwight each own a number of claims in the neighborhood north of me. Some of Mr. Phillips' adjoins mine on the north. Mr. Dwight is further up the canyon. They are all within a mile and a half or two miles. Work has been done on these claims this year. They are not working just now. I think this is a mineral country where I am. It has got mineral in it. So far as developed the ledges are running east and west almost to a point and their dip or trend is to the north as far as they have been developed. I know of a mineral location belonging to Mr. James Phillips north of Dry Buck.

Cross-examination:

The claims I refer to are owned by an incorporated company. The mine was in operation from about the 15th of January.

1903, to the first of March, 1905, or about two years and two months. At times the company employed as high as six or seven men. The principal part of the work was done with two men; one on each shift. While we were prospecting the mine we caused assays to be made to ascertain the value of ore in sight. This we did while sinking the shaft. We have not made assays in the tunnel as we have not got to the ledge. The shaft was 85 feet deep when we quit. It is 4½ by 6 feet. It is sunk on the vein and with ore in sight all the way. Altogether we probably had a hundred assays made. The work in the tunnel is in barren rock. The strike on the vein varies only a point from due east and west. The claims are strung along end to end a distance of 5,160 feet on the west side of the river and 6,000 feet on the east side across the Payette, probably 6 miles below the junction of the North and Middle Forks. The work is on the west side of the river, probably from 1,000 to 1,200 feet from the river. The tunnel is about 600 feet from the river. The claims of Mr. Phillips extend from a half a mile to a mile and a half north of our claims. He has still other claims about six miles north—just north of the mouth of Dry Buck. Mr. Dwight's claims are about ¾ of a mile north of our claims. I call these claims adjoining because they are in the same neighborhood; within a half a mile of ours. As far as they have been developed the claims of Mr. Phillips and Mr. Dwight are on ledges parallel to ours. The claim of Mr. Phillips on Dry Buck is about six miles from ours in a northwesterly direction and about a quarter of a mile back from the river. I do not know the extent of the development of these other claims nor anything concerning the value of the ores, if any. The gross outlay of our company in the development of our claims is between seven and eight thousand dollars. The only improvement we have consists of a little shop. The claims are not in operation now by reason of the lack of capital, and lack of capital is owing to the failure to place any more treasury stock. It is not through the inability of the directors to put up more money, but we are not getting our capital that way. We are getting it by the sale of stock. We expect to start up again by winter. No dividends have ever been declared. About 20 tons of ore altogether was extracted. It is a base ore. We call it galena ore, carrying lead, silver, gold and copper. The only shipment from the mine was a sample of 300 pounds sent to the smelter to have a test made—an analysis of the ore. The assays, the results of which I have produced here, are seven out of a hundred or more that we had made. These are from some of the best specimens of the ore. I don't think I can produce the certificate of the other 93 assays. These seven are some of our very best assays. The mine has never been a producing mine yet. We are making arrangements for placing treasury stock. None has been sold recently. This treasury stock is open to purchase by the stockholders. The amount of treasury stock disposed of to parties outside of our regular stockholders is probably $2,000. The remain-

der of the sum expended has been put up by the original stockholders. I do not know anything about the character of the land immediately where the timber was cut by Mr. Plowman. Have never been on the ground to my knowledge.

C. H. ROBERTS, sworn as a witness for defendant, testified:

I reside in Boise, Idaho. My business is real estate. Do not know where Mr. Plowman cut timber in township 8 north along the Payette River. I have three mining claims in the vicinity of the Payette River. I cannot give the legal subdivision, but think they are about a half to three-quarters of a mile from where the sawmill now is. These claims are called the "Spinning Wheel," "Mountain Lion No. 1" and "Mountain Lion No. 2." I have been interested in
33 these claims since April, 1901. I have been on these claims at different times.

By the COURT. How near do you claim this property is to the property upon which the timber was cut?

By Mr. BORAH. This is within the immediate neighborhood of the cutting; within half a mile.

By the COURT. I understand the objection (of the United States attorney) goes to all the testimony concerning mining claims that are not upon the land from which the timber was cut.

Witness resumes:

There has been timber cut off the ground covered by the Mountain Lion location. Do you know who cut it?

Q. Describe to the jury the amount of work which has been done upon your claims.

A. Well, there is one tunnel about 65 feet long. And there is another tunnel about 45 feet long. And there is a shaft about 10 or 12 feet deep. And then there are four or five other prospect tunnels from 10 to 12 feet long.

Q. To what extent, if at all, has the ledge been opened up?

A. They opened up the ledge 45 feet in one place, and we opened up the ledge about 60 feet in another place; and we cross-cut 30 or 40 feet in another place.

34 The assays of ore from these claims have disclosed values from $1.20 up to $260 per ton. I have at different times made selections of different rocks and formations in that locality and had the same assayed and it disclosed mineral. The country there is a mountainous, broken country. I do not think it is in any sense an agricultural country.

Cross-examination:

I am not a miner or prospector. Never mined in my life. Have prospected a little every summer during the last five years around up in that country. Was there a week or ten days in 1903, and four or five days in 1904; also four or five days in 1902 in Garden Valley. These were incidental to my vacation trips. Altogether I may have

prospected forty or fifty days. I do not know what the term "country rock," as a miner terms it, means. I do not pretend that I am competent to testify as to the mineral character of the land. These claims in which I am interested were located by a prospector, George Carey, who was prospecting for myself and my partner, Mr. Good. About $500 each year has been expended in the development of these claims since their location in 1901. I should judge we had altogether as many as twenty assays from this property. I think
35 we had two of those high assays. These were of rock delivered to me by Mr. Carey. I did not see him dig it from the ledge. He delivered it to me at the cabin at the time. There were several more pieces of rock on the dump there just like it. Mr. Carey is not here as a witness. I have had ore assayed that I myself removed from the ledge, once each year as I went up there. These samples, as I remember, assayed from $12 to $36. No dividends have ever been declared by the company and no labor has been performed on these claims since 1904. We have not done the annual labor on these claims for 1905, but have made arrangements to have it done. These claims of ours are on the same ledge and join end to end. The course of the ledge is nearly due north and south, perhaps a little northeast and southwest. Most of the way its course can be traced on the surface. We have made several excavations of from 4 to 12 feet deep and have found mineral in all of them when we struck this particular vein. There is a little low-grade mineral in the croppings.

B. F. PILGRIM, sworn as a witness for defendant, testified:

My home is in Boise, Idaho. Am familiar with the ground in township 8 cut over by Mr. Plowman. I was in his employ as
36 a millwright at his sawmill. I know where the Faith and Liggett mining claims are. They are about three miles from the place of Mr. Plowman's timber cutting.

Q. How far is this timber cutting from the mining district of Pearl?

By Mr. RUICK. All this is subject to our objection, of course.

A. Well, the nearest point, I should judge, to the Pearl mining district would be about 14 miles.

It would be about five miles from the Quartzburg mines. From the cutting to the mouth of Dry Buck it is about two and one-half miles and it is between 7 and 8 miles in direct line to the mines at Horse Shoe Bend. The ground cut over in township 8 is very broken, very mountainous. It is not adapted to agriculture. It is a country of very steep hillsides, granite formations, no soil to speak of on the tops of the granite rocks and boulders.

J. F. REED, sworn as a witness on behalf of defendant, testified:

I reside on the North Fork on the Payette River. My business is mining, prospecting. I have lived on the North Fork off and on for about eight years. Have been a prospector during all of that time.

I have prospected in the vicinity of the North Fork and have
37 mined on Dry Buck. Do not know where the Mountain Lion claim is. Expect I know where the Liggett and Thompson claims are, but am not positive. I have some mining claims about a half or three-quarters of a mile east from where some timber has been cut. Could not say Mr. Plowman cut it, as I don't know. I am interested in two mining claims. Mr. Forbes also has two claims in that vicinity. I have been interested in my claims since September 1st and have worked a little on them. My claims were located since the first of September, but I have known where the claims were for four years or more. I had a house on one of them about four years ago. I have placer mined in that country on the Payette River from Jerusalem up to where the North Fork and South Fork came together. I found a living there. I had to come back there to make a living two different years. I have been working placer mining with a rocker and Beach machine for the last seven years, off and on. The country is a rough, broken country. There is some little agricultural country in that immediate vicinity. Two or three ranches at the mouth of Dry Buck and one below the mouth of the North Fork. I have found mineral in prospecting over the country up the North Fork of the Payette River and in and about the Dry Buck
38 country. I find mineral most every place. Most of the quartz I have found is mineralized. There is some that is not. I cannot tell you to what extent a ledge or ore deposit is disclosed in my mine. I have not either wall in mine. I know it to be a hundred feet or more wide; but I cannot tell the width, for I haven't either wall. I have not had any assays made from it, since I located it, but about four years ago I had it assayed in Butte, Montana, and it went something over $2.40 in silver.

Cross-examination:

I am stopping on the North Fork of the Payette River. I have no permanent home. I have been up there in that part of the country for the last 7 or 8 years. I couldn't tell you in how many different places I have lived during that time. I have run all over the country prospecting. Wherever winter comes on I generally stop. I live in a tent, just moving about from one place to another prospecting. I first became acquainted with the claims I now own an interest in five or six years ago. There had been a location on one of these claims but it was old. The stake had rotten down and there was no notice on it. The stake was all that showed it had been located before. My location is a relocation of an old abandoned claim. I located it as a tin mine. I had a sample assayed and the assayer told me there
39 was no tin *it in*. I don't know what else it contains besides tin. I know it is heavily mineralized. I don't know anything about the values of it at all. All I know about the width of the ledge is I just stepped it off to have some idea how far it was. Have never cross-cut the ledge. Have two or three cuts on it, but none of them cross-cut it. It stands up out of the ground; crops out of the surface.

I am on the backbone of the ridge and its crops out all along the ridge up there. I have not dug down to find whether there is a permanent ledge there. It ain't a mine until it is developed, but I think it will be a mine when it is developed. I don't know the value of it yet. The assay which showed $2.40 a ton in silver, I had made in Butte, Montana, four years or more ago. My partner had it assayed this spring and it went over $1.50 in silver per ton. It contained nothing else that I know of. He had it assayed for gold and silver. These claims of mine are, I should judge, from a half to three-quarters of a mile from the place where they told me Mr. Plowman cut the timber and across the river. The claims, as near as I could tell, would run across the river over in below where Mr. Plowman cut that timber. I have placer mined up and down the Payette River from the mouth of the North Fork down pretty near to Jerusalem. I have
40 also mined in Dry Buck Basin. I staked a claim there, but didn't record it. I once recorded a placer claim in Dry Buck Basin. I should judge about three miles from the river on school section 16. I bought the Cook claim there, me and Mr. Wood, and then I took up the adjoining claim. I couldn't tell you how much gold all told I ever dug out of any or all of those claims. I have been mining there several years and should judge I have taken out somewhere between two and three hundred dollars in seven or eight years, but I have not been mining there continuously. I have been away from there and have come back there to make something to winter on. There is no systematic placer mining going on in that locality referred to. Just grub diggings: work to make a living. I have some placer mines on the North Fork that I calculate to work this winter, and I intend to make my living off of them this winter. I have not got them recorded and they are open to location by others, but I don't think anybody else will bother them. If anybody else comes in and locates that ground, they are perfectly welcome to it.

41 E. T. HORINE, sworn as a witness for defendant, testified:

I reside near Sweet, Boise County. Have resided in that vicinity fourteen years. My occupation has been mining and cutting timber. I have been familiar with mining for some thirty-five years. I have been familiar with the country on the North Fork of the Payette River and about Dry Buck in township 8 north for about ten years. I know the Plowman timber cutting. I know where Thompson's claims are. They are about three miles from where Mr. Plowman cut timber in township 8. I have known of the Thompson claims for two years. Have never been there. Do not know where the Liggett claims are. Know where Reed's claims is. It is about a half a mile from where Plowman last cut timber. That is very mountainous country. Cut up by ravines and canyons. It is not in any sense an agricultural country. It is about three miles from where Plowman did the cutting—the nearest point—to the Dry Buck mining country and about five miles to the Quartzburg mining region and about thirteen miles to the Pearl mining country.

By the UNITED STATES ATTORNEY. This is all subject to our objection.

By the COURT. Yes.

Witness resumes:

42 It is seven or eight miles to the Rock Creek mines. I have not prospected in the vicinity of this timber cutting. The Alpine mine is about three miles above where Plowman cut on the river. I should judge seven or eight thousand dollars has been expended in the development of this mine. I have worked in it and have represented it for two years. The tunnel that cuts into the ledge is about 150 feet long and the best of the ore goes 1,800 ounces to the ton and where it was shipped it netted $300 to the ton. It was packed out and shipped. It carries silver, gold and copper. I know of Reed's mine; where they claim he has located. There used to be a placer claim close there to the mouth of Dry Buck; about a mile and a half away. This country is not in any sense an agricultural country.

Cross-examination:

The Alpine mine has been located fourteen or fifteen years. It was mined a few years and then it has been represented the last five years. They worked on it all the time the first few years, but the last few years there has been nothing done on it except representation work—annual labor, and it lies there now without being operated.

43 For the first three or four, maybe five years, they worked it all the time. They packed ore out and shipped it. It has not been profitable the last few years to work the mine. When I refer to the last cutting of Mr. Plowman, I refer to that on the west side of the North Fork. The cutting of 1902–3. The Alpine mine is over a divide, in a northwesterly direction and about three and a half miles away. I never went over the hill. The Alpine is a kind of a blanket ledge, and runs in a southeast and northwest course. The first cutting of Plowman is about three miles from the Thompson mines. The last cutting of Plowman is two or three miles from the Thompson claims. I do not think they are as much as five or six miles away from the cutting. The Alpine mine is pretty near due north from the junction of the North and South Forks of the Payette River and about six miles in an air line and about two miles back east—from the North Fork and about three and a half miles from the last cutting of Mr. Plowman in township 9 north.

J. J. FAITH, sworn as a witness for defendant, testified:

44 I have resided near Horse Shoe Bend in Boise County, Idaho, about three years. Have been engaged in logging and mining. I know where Mr. Plowman cut timber in township 8 down on the Payette River below the mouth of the North Fork. I have been over that ground. I am interested in some mining claims in that vicinity. I also know of some quartz mining locations of Mr. Carey's which runs right up into the timber which Mr. Plowman cut in township 8. I refer to the Mountain Lion and the Spin-

ning Wheel claims. These are the claims in which Mr. C. H. Roberts is interested and the timber that was cut stands immediately surrounding and on some of those claims. There are three claims in that group that I know of. The Faith and Liggett claims in which I am interested are about three or four miles southeast from the Plowman cabin. There are four of them. I have been interested in those claims since August, 1904. My associates are Mr. Liggett, Thompson, and McIntyre. The mines at Quartzburg are right across the hill from us, between three and four miles away. These mines at Quartzburg are between five and six miles from the Plowman cutting. Our mines are about midway between the Quartzburg mining region and the Plowman cutting. Assays made on our claims show values of $2.16 per ton in gold. I know of Thompson's claims across the river. These are between two and three miles from where Mr.
45 Plowman cut timber in township 8. This is a steep and mountainous country and in no sense an agricultural country. Quartzburg is in a southeasterly direction from this cutting in township 8 and between five and six miles away. The cutting is right north of section 16 in township 8—northwest, I should say. Two of the Faith and Liggett claims were located April 16th of this year by myself, Mr. Liggett, Thompson, and McIntyre. There are four claims in the group; they lie side by side, two and two. The ledge runs in and southeast and northwesterly direction. We have worked there since June of this year. We are at a depth of 19 feet on one claim and about 45 feet on another. We have had two assays made, one returning $2.06 and the other $2.30 per ton in gold. These were hand samples of ore picked up on the surface. Have never had any average or mill test made. My partner's name is G. Allen Liggett. My partner has a homestead in township 8. I don't know what section it is in. I have a homestead in section 21, township 8 north, range 3 east. Section 21 joins section 16 immediately on the south, and the timber cutting is in the section immediately north of section 16. At the time I filed my homestead declaration in the United States Land Office I made oath that the lands filed upon by
46 me in section 21, township 8 north, range 3 east, were nonmineral—contained no mineral and were valuable for agriculture. I made a nonmineral affidavit as to the lands lying two miles from the timber cutting of Mr. Plowman. The Thompson mines are about three miles in a southeasterly direction from this timber cutting, which is just northwest of section 16 and are on the opposite side of the Payette River. I was in Mr. Plowman's employ, assisting in cutting timber during all the time that the timber in township 8 was being cut. I think the timber was cut before the Roberts—otherwise Carey—claims were located. I never made any survey of the Roberts-Carey claims, but stakes of the Mountain Lion claim No. 1 are on the ground from which Mr. Plowman cut this timber. I went to one of the stakes recently. I just happened up there. I had no purpose at all in going. I saw two stakes at that time. I saw the southwest stake of the Mountain Lion. There were

no prospect holes on the ground where the timber had been cut. I couldn't say that there had been any holes sunk or any excavations of any description made in mining upon the land from which this timber was cut in township 8. There was location work done there, that is all. There was a hole about 4 by 6 and about 8 or 10 feet
47 deep. I suppose it had been that deep. It is caved in. It is 5 or 6 feet deep now. I saw it a few days ago. This hole was right alongside of the trail.

Redirect:

My homestead is about two miles from the Faith and Liggett claims and about two miles from where Mr. Plowman cut this timber. There was no known mines upon the grounds which I homesteaded; not any indications of mineral that I noticed. I didn't prospect for mineral on my homestead, to know whether it was there or not. I don't think it was there.

C. A. Liggett, sworn as a witness for defendant, testified:

I reside twelve miles northeast of Horse Shoe Bend in Boise County, Idaho. I have mined for the past thirteen years. I am interested in claims near where the timber is supposed to have been cut by Mr. Plowman. I am interested in the same claims as Mr. Faith. I should judge we have done between seven and eight hundred dollars' worth of development work. It discloses mineral-bearing ore. Have had one assay made; it showed just traces. The country up around there is rough, steep and mountainous and is cut up by gulches.

48 Cross-examination:

The Faith and Liggett mines, I should judge, lie between three and four miles to the southeast of the Plowman cutting. I have a homestead in section 15, township 8 north, range 3 east; the same township, in which timber was cut. My homestead is southeast of where the timber was cut. I should judge a mile and a half distant. I did not prospect my homestead before I filed on it. I did examine the land to ascertain whether it was mineral in character and I decided it was nonmineral. There were no indications of a ledge through it. My homestead is in the same direction from where the timber was cut as are the Faith and Liggett mines, and the homestead is only about a mile and a half from where the timber was cut. The Faith and Liggett mines are three or four miles. I am a miner and know what mineral indications are, and I have prospected considerable. I decided that the land in the vicinity of my homestead was nonmineral.

Redirect:

My homestead entry was made in 1903. The Faith and Liggett mines were discovered in February, 1904.

49 Recross-examination:

I have not discovered any mineral on my homestead. I still regard it as nonmineral.

ED. STANLEY, sworn as a witness for defendant, testified:

I reside at Emmett, Idaho. Have been familiar with the lumbering business for twenty-three years. I have had experience in cruising timber. I know the ground in township 9 north, which Mr. Plowman cut over. Have been in that section of country a number of times. The country is high, mountainous, rough, not suitable for agriculture and timbered in spots. It is not in any sense an agricultural country, and could not, I think, be made such. I would not call it good timber land. It is barren, the ground there without timber. Some of the gulches have timber in and other places there is no timber. Township 8 north is of a character similar to 9. I think the timber has been, or is, heavier in township 8 than in township 9. I have seen ledges—quartz ledges—and location notices in the vicinity of the cutting in township 9. I also had a claim one time staked off in township 9 myself—in 1892. Do not know where the Alpine mine is. I have been over township 8 where the timber was cut. Am
50 not acquainted with any of the mines in that vicinity except Mr. Thompson's. I should judge that was between two and three miles of the cutting. The Quartzburg country is something like five or six miles away and Pearl about twelve miles in a direct line. From the cutting in township 8 it would not be over a mile and a half to the mouth of Dry Buck, where the old placer mining was done at the mouth of the creek, and probably not over two miles or two and a half from what is termed Dry Buck Basin. There were old placer mining workings in that general vicinity when I was first through there in the fall of 1883 along the Payette River at the mouth of Dry Buck Creek.

Cross-examination:

I have followed mining some. No great length of time. I have worked in quartz and in placer mines and have prospected some at different periods, principally in 1893 and 1896. I located a claim about two miles above the mouth of the North Fork—above the junction of the North Fork and the main river—that was in 1892. It was a quartz claim. I located it for myself alone. I only done the location work. I found float there. Never found the ledge. Found float and had one assay made. It went 1% copper, which I never thought
51 much of, and I never went back to the claim afterwards. When I got the assay I quit. At the mouth of Dry Buck there has been some quite extensive placer mining and of late years there have been some parties there rocking and shoveling in old sluices—not extensive, though. There has been a place there where they have worked off an acre or two of ground. That is above the mouth of Dry Buck Creek on the main river some three or four miles below the mouth of the North Fork below the junction of the North Fork and the South Fork. In Dry Buck there is rocking and such work as that along the river below. I saw mining there along the river two years ago. I do not know whether any claims have been located along there. I know where this timber cutting of Mr. Plow-

man's is, both in township 8 and 9 north. There are no placer claims or placer mining on the lands cut over by him that I know of. The claims on Dry Buck is about a mile and a half from the cutting in township 8 and some 4 miles or more from the cutting on 9, but there was a claim worked west of Mr. Plowman's on top of the mountain within about a mile and a half. I mean a placer claim on top of the mountain. I have not been up to it since 1896 and don't know whether anything has been done to it since. This was a mile and a half from the river and something like a mile and a half from the land
52 cut over by Mr. Plowman. I have no knowledge of any mineral on the ground cut over by Mr. Plowman, only this float, and I didn't regard that of sufficient value to follow it up.

Redirect:

The mining I speak of at the mouth of Dry Buck was on the main river between a quarter and a half a mile above the mouth of Dry Buck. They used a hose and sluice boxes—hydraulic system. Could not say to what extent it was worked, nor how long they continued there. There was a large bank there and the bedrock exposed where they had been mining. There was quite a large bed of gravel there. I think they worked most of it out. They had worked along in different places. This placer claim on top of the mountain was on the head of a small creek that goes into Dry Buck. The claim at the mouth of Dry Buck is about a mile and a half west of where Mr. Plowman cut timber in township 8. The mouth of Dry Buck would be some four or five miles south of where Mr. Plowman cut in township 9.

Recross-examination:

The last mining I saw done near the mouth of Dry Buck was two years ago. I do not know to what extent they mined. I saw
53 a man working there. Don't know how long he had been working. Have seen mining there a number of different years. I don't know whether the mining was profitable or not. This placer claim on the top of the hill, all the water they had to work it was snow water. That mining was done in 1895 and 1896. I was there. They were working it by stripping and shoveling into a rocker. Two men were working. That was in 1895 and 1896. That is all I ever saw there. I know nothing with regards to the returns. They showed me a vial of gold where they had prospected it and some little nuggets. They have not worked there since to my knowledge. I have not been there. There is a ridge between the river and the point on Dry Buck where the mining was done.

EDWARD ALLEN, sworn as a witness for defendant, testified:

I have resided in Emmett, Idaho, for about eleven years. I have been familiar with the timber business for twenty years and have been interested in mining. I know where Mr. Plowman cut timber in township 9 north on the west side of the North Fork of the Pay-

ette River. Have not been over the ground, but have been all around it. Have been where I could see the logs, also the country surrounding it. It is a very rocky, rough, steep country.

54 Q. Do you know of any mines or mining claims or mining ground in the vicinity of where Mr. Plowman cut in township 9?

A. Yes, sir.

By UNITED STATES ATTORNEY. This is all subject to our objection as I understand it, that it is incompetent, irrelevant and immaterial for the reason that it relates to lands other than the lands from which the timber was actually cut.

By the COURT. Yes, sir; that is the objection all the way through.

Witness resumes:

Mr. Reed has a claim within about a half a mile in a straight line from where Mr. Plowman cut these logs in township 9. I have been on his claim and two other claims, I believe, that are there. The ledge has been cross-cut on top like—just dug into, and it exposes about 10 feet of ore. I was not over but the two claims. The Alpine claim is about 4 miles in a northeasterly direction from the cutting. I have been on that claim. There is a ledge about 18 inches wide that assays from $72 to $82 a ton in gold, silver and lead. I think it is owned by the Old Glory Mining Company of Boston. There is about 200 tons of ore out on the dump there, I should judge, and there is about 12 or 15 tons piled up in the mine. I took samples and had

55 assays made. One assay, I think, was $72 and the other was $82 in gold, silver and lead. There are indications of mineral in several questions, indications of mineral all over the river for that matter. There is ledges and stringers all over the country and float. I have picked up float that was not in any ledge, that is there was no ledge in sight. It was just a piece of quartz or rock that assayed $1 a ton, that was between the river and the Alpine mine. There is a great deal of float out through that vicinity.

Cross-examination:

My principal business has been merchandising, buying and selling lumber. I operated a sawmill two years ago for a short time. I have worked in mines and regard myself as competent to speak on a gold-mining proposition, both in quartz and placer mining. My purpose in examining Mr. Reed's claim in township 9 in the vicinity of Mr. Plowman's cutting was I had thought of locating it for about two years. I had found float two years ago in the gulch about 100 yards from Mr. Reed's location and it looked to me like copper or gold ore. I mentioned the subject to Mr. Horine, who has been a witness in this case. I talked with him in July this year. The claim was originally located by parties before Mr. Reed and prospected to a small

56 extent. There is 10 feet of solid ore exposed. Could not tell the width of the ledge as neither wall or the vein was in sight. There has been a kind of an open cut run into the ledge, started in on the quartz; it crosses the ledge. There is float scattered along the sur-

face 50 or 60 feet wide probably and in a string one-half to three-quarters of a mile long indicating the direction of the ledge. This cross-cut on the vein was about 4 or 5 feet deep and 12 or 14 feet long. My purpose in taking samples and going to the expense of having the ore assayed when I found the mine already located was to find out if that ledge contained mineral and thought if it did that if Mr. Reed did not prospect it, I would. I might make a trade and get it. I visited the Alpine mine on the same trip. I have never been up there. Had heard a great deal about it and thought for some time that that was a mineral country. I heard that there was rich ore there and I wanted to satisfy myself. No one was at the mine. I entered the workings and inspected it to a certain extent. I took the samples out of the ledge and had them assayed. I have no interest in the property. My object and purpose there was to ascertain whether or not this region was a mineral country. Am thinking of starting out prospecting if I am in a country where there is ore. Mr. Horine was with me this time.

57 Q. Well, now, Mr. Allen, the Government has a claim against you and you have been reported also to the Department for having cut illegally something like 1,400,000 feet of lumber on the Payette River in the vicinity of this cutting of Mr. Plowman's, isn't that correct?

A. That is correct.

Q. You have given bond to the Government to pay the value of that timber whenever it shall be ascertained that you are liable to the Government therefor?

A. Mr. McNish and Allen.

Witness resumes:

The nearest portion of the land where I cut the timber is about a mile from the Reed claim and the nearest portion of my cutting to the Alpine claim is about a mile and a half. I understand if this land up there should be found to be mineral land, within the meaning of the act of June 3, 1878, that the Government will not be able to recover against me. I have the assay that I had made from the Reed mine.

(Here counsel for defendant offers in evidence assay certificate referred to. Objected to by United States attorney on the ground that it is incompetent, irrelevant and immaterial, and for the further reason that it relates to lands other than the lands from which the timber was actually cut. Which objection was overruled by

58 the Court. To which ruling counsel for plaintiff then and there duly excepted. Certificate introduced as Defendant's Exhibit No. 6, and shows gold 4 ounces of a value of 82c per ton and silver 1.18 ounces, 73c per ton. Total value of $1.55 per ton.)

ADAM C. FRALICK, sworn as a witness for defendant, testified:

I reside in Boise City, Idaho, and have followed mining 12 or 14 years in prospecting and developing mines, both placer and quartz

in gold, silver and lead. I have operated in the Boise River country, Payette and Boise Basin and the Salmon River country. I have followed the business of assaying for six or seven years. The Pearl mining camp or district is about 6 by 12 miles in extent and extends northeasterly to Horse Shoe Bend. The Payette River proper runs through the northern and northeastern part of Pearl district. From the Lincoln Mine in the Pearl district it is about 7 miles in a northeasterly direction to Horse Shoe Bend. That country is mined the entire distance from the Lincoln Mine to Horse Shoe Bend. I was shown the place in township 8 where timber was cut by Mr. Plowman. It was pointed out to me by Mr. Richard Plowman, son of the defendant, about two weeks ago. Ex-gov-
59 ernor Hunt was along. I wanted to look that ground over to see whether it was mineral or not and the conditions of the ground after Mr. Plowman got through with it. I found considerable mineral: took several assays and found it to carry very good values. I found this mineral adjacent to the ground on which Mr. Plowman cut the logs and some on the ground. The claims where I took the samples are the Mountain Lion Nos. 1 and 2 and the Spinning Wheel. As we approached this place we discovered a quartz porphyry and some cyanide and quartz itself. This was right on the road. The timber was cut on this ground. We examined the work of Mr. Carey and Good & Roberts on the Mountain Lion claims. Found two or three tunnels: considerable work done and ore on the dump. Found every evidence of mineral. I could see in the tunnel 30 or 40 feet. I did not have a candle. Did not go in all the way. There was ore exposed on the surface and some in the tunnel. I took no sample from the mine, but took some off the dump. The ore on the dump was very similar to the ore on the surface. There was croppings on the ledge close to the mouth of the tunnel. I took five samples. The two or three first samples came from the dump. The rest from the surface down on the Mountain Lion No. 2. Samples Nos. 1 and 2 came from the dump and 3, 4 and 5 off the ground where the
60 timber was cut. Came from the croppings: I don't know where sample No. 6 came from. It was handed me by other parties.

(Assay certificate marked Defendant's Exhibit No. 7 for identification offered in evidence. Objected to by United States attorney for plaintiff on the ground that the same is incompetent, irrelevant and immaterial and for the reasons hereinbefore stated in the record and for the further reason that it is not made to appear that this certificate represents assays of ore actually taken from the mine in question.)

By the Court. I will allow them to be introduced for what they may be worth.

(Certificate introduced as Defendant's Exhibit No. 7. To which ruling of the Court counsel for plaintiff then and there excepted.)

Witness continues:

Sample No. 1 was from the dump of the Mountain Lion and gave 10% lead and 24⅔ ounces of silver per ton. That rock was very

similar to other rock upon the croppings or exposed by the work on the property. The next sample gave 3c in value of gold per ton. The two pieces of rock in this sample came off the Spinning Wheel claim. There was considerable of that rock on the dump and
61 I noticed it on the part of the croppings close to the mouth of the tunnel. Sample No. 3, ten hundred thousandths of an ounce of gold and a trace of silver. The three small pieces comprising this sample were taken off the ground where the timber was cut; that would be the Mountain Lion No. 2. Sample No. 4 was a concentrated sample. Twenty-five tons in one, gave two ounces of gold, to the ton that was taken off the ground where the timber was cut and was panned down and the concentrates saved and assayed. Concentration was by pan test. Sample No. 5, described as lava rock. Came off the ground where the timber was cut. I took that sample myself. In appearance the region where the timber was cut and where these samples were taken is very rough and abrupt, precipitous and rocky—all cut up with ravines. There is no agricultural land in that immediate vicinity. It is 7 miles in a direct line from where the timber was cut to Quartzburg.

Cross-examination:

The only knowledge I have as to where the timber was cut by Mr. Plowman is from Richard Plowman, his son. It was pointed out to me by him. I trusted to him for information as to where the ground was. He also pointed out to me the Government land which he
62 had cut over. I do not know which piece he cut over or which piece Mr. K. P. Plowman cut over, except as Richard Plowman stated it to me. At the point where I took ore from the land on which the timber was cut I found some mineral on the surface in an open cut. It was partly caved in. It was a kind of an open cut about four feet deep and about six or seven in length. I discovered in that cut what I termed a mineral bearing ledge. I took samples No. 3 from that. I found it in places in the ledge and dug it out with our hands and a root of a tree. We didn't have any pick there. That is where we got samples that assayed $2.06 in gold and a trace of silver per ton. We went along the ledge on the ground where the timber was cut and picked up ore which was embedded in the cropping. We got it out in the same way as we did the other. Some of it was loose on the surface. Samples Nos. 1 and 2 we got from the dump of these other claims. I did not examine the workings of these mines. I went in a ways in the tunnel. Nobody was working there at that time, and I came away without ascertaining whether there was any ore actually in place in these mines. I saw ore on the croppings close to the mouth of the tunnel.

63 Ross CARTER, sworn as a witness for defendant, testified:

I am a civil engineer and architect residing at Boise. I have prepared and have here in court a map showing the outline of the country in the vicinity of the North Fork of the Payette River and

Horse Shoe Bend and what is known as the Jerusalem country. It was copied from the Geological Survey maps. This is a tracing. The scale is two miles to the inch.

(Counsel for defendant offers map in evidence for the purpose of showing the location of the different points testified to in relation to each other.)

By U. S. ATTORNEY. No objection to the introduction of this map for the purpose of illustrating the natural features of the region referred to, but we do object to its introduction for the purpose of showing the proximity of established mining districts to the land from which the timber was cut.

By the COURT. I see no objection to its introduction as to the proximty of other mines and camps, that is a proposition I shall instruct the jury on.

(To the ruling of the Court in overruling the objection of plaintiff to the introduction of said map for the purpose of showing the proximity of establishing mining districts to the land from
64 which the timber was cut, counsel for plaintiff then and there duly excepted. Map introduced in evidence as Defendant's Exhibit No. 8.)

(Here insert map.)

FRANK W. HUNT, ex-governor of Idaho, sworn as a witness for defendant, testified:

I reside at Boise. Have been engaged in the mining business for twenty-five years, both quartz and placer. I made an examinaton in connection with Mr. Fralick of certain land pointed out to me by Mr. Richard Plowman as the land from which timber had been cut by Mr. K. P. Plowman. The district surrounding generally is mineralized from Pearl to Horse Shoe Bend right up onto the top of the mountains where Mr. Plowman cut. We paid some little particular reference to this district itself on top of the mountain where Mr. Plowman cut. The first indication I saw of mineral on top of that mountain, which is a very high one, and it took us a long time to get there, was where a ledge crosses the road, and as near as we could get at it it was just about on the section line between nine and ten—between sections 9 and 10—just about on that line: that was a ledge there which showed probably five or six feet wide: we knocked some off of the rock: it was crumbly: it had been decomposed by the air: we picked down a little of it and looked at it, and some of it
65 looked like it ought to carry values. We took a sample and carried it away with us. Then we followed the road on down a little further and struck the point where Mr. K. P. Plowman had commenced cutting. The country about that point jumps off pretty steep: it is a very steep, rugged, precipitous country from that on down toward Flemming Creek and toward the Payette River. We walked over this ground, over quite a bit of it—as far as I could

see any timber cut. And Mr. Plowman said that he thought there was another ledge that passed through that ground and that he perhaps might be able to show it to us, or show us more than one; and I found it myself without his assistance; just happened to run onto it; and it was where there had happened to be a little slide of land or perhaps where some work had been done in former years, or it might have been a big tree that had fallen and dug away the bank from the bedrock; the surface there did not cover the ground very deep; it left this exposed; I took a stick and just scraped this bank down and exposed this ledge; and we took some samples out of that. After we came back from there we went over on—we were right in the vicinity of this ground, or claims—we went across what was called the Carey claim—Mountain Lion, I think it is, No. 2;
66 and from there we went up to the Good and Roberts ground; and on the side of the hill we saw a tunnel evidently in several hundred feet; we didn't visit that tunnel; there was no particular reason why we did not visit it, except that we had spent a good deal of time on the ground and it was getting towards dusk and we had to return four or five miles, part of the way up a steep mountain, and we wanted to get home before it got too dark; so we didn't go to that; but we did visit the location—the discovery; the discovery laid right almost in the creek, right in the center of this gulch, and on this discovery was a shaft; I don't know how deep it was because it was full of water and I couldn't measure it; also a tunnel; the tunnel was certainly in more than 30 feet, and I don't know how much farther; we didn't go into the tunnel. The ledge shows in front of the tunnel and between the shaft and the tunnel, and the quartz that had been taken from the shaft or the tunnel, I don't know which, but I think from the shaft, there was quite a number of tons there, and we dug down into it and took some samples—took several samples from it. There was some ore there that was oxidized. There was a few pieces there that had some lead in—galena—what is termed kidneys. I think that was about all the examination I have the mineral portion of that district.
67 We then came on back by the mill. I did not have anything to do with assaying the samples that Mr. Fralick and I took. In my opinion that is distinctly a mineral country. On the Brainard Creek side, after you leave the Fayette River, there are some ranches, but as you come up on the mountain those ranches stop. The ranches are on a much lower elevation. This timber was cut a long way above the river, but I do not know the elevation. The country is cut up into ravines and gulches.

Cross-examination:

I visited this section at the instance or solicitation of Mr. Richard Plowman about the 10th or 11th of September. I don't remember any excavation on the land where the timber had been cut by Mr. Plowman, except as I have described it, that evidently a tree had broken

over there or else a little landslide had occurred, that is what I think it was, and it had moved part of the hill down and you could see this ledge cropping out six or seven inches under the surface soil. I took a big stick and just scraped it down and then you could see it plainly sticking out there for six or eight feet. Mr. Fralick and I took the samples. I turned them over to Mr. Fralick. Did not mark them.

68 Q. Do you remember seeing an excavation there on the land which had been cut over by Mr. Plowman?

A. No, I don't remember an excavation. The only one I remember is the one that I have described.

Q. That is where a tree had fallen over——

A. I think it was a little landslide.

Q. Didn't you see a little hole some four or five feet deep near the road that samples were taken from?

A. That is where the road crosses this ledge?

Q. Isn't there a hole there—an excavation at that point?

A. I don't remember any hole there.

Q. Didn't you assist Mr. Fralick in taking a sample out of the ledge in that little hole?

A. There is no hole there. The road crosses there and it makes the upper bank expose the ledge; it is dug out a little. There is an old lick there—there is a hole there, yes.

Q. Did you visit with Mr. Fralick any excavation on the land which Mr. Plowman had cut over?

A. Yes, sir.

Q. What excavation was that?

A. That is the place I refer to.

Q. Where the tree had been torn out?

A. No, sir, where the road crosses and where this is gouged out—I think it is a lick.

Q. Near the road?

A. Yes, sir.

69 Q. Did you take samples from there?

A. Yes, sir.

Q. Mineral samples?

A. Yes, sir.

Q. You don't know which of these samples it was?

A. No, sir.

Q. How deep was the excavation?

A. I don't know. It was just a little hole, just gouged out a little.

Q. Was that the only hole within the boundaries of the land cut over?

A. Yes, sir.

Q. No other excavations?

A. No, sir.

Q. And no other indications of ore anywhere else on the claim?

A. No, I didn't find any.

Q. So far as the land cut over is concerned?
A. No, sir.

K. P. PLOWMAN, called as a witness in his own behalf, testified:

I am the defendant, charged with cutting timber in townships 8 and 9. Have been a resident of Idaho since 1864. First commenced cutting timber up in that section in January or February, 1900. I went over that country first in May or June, 1899. I went there to look over the ground to determine whether I would cut timber from it. That country is very rough and rocky, pretty much all rock—not much soil. Prior to the time I commenced cutting I visited
70 this ground probably eight or ten times. I knew there had been considerable mining in different places around there. I thought there was mineral there. There was no agricultural land there except there might be an acre or two under some spring. I thought this was mineral land. A good deal of this country is the same as the basin country in Boise County where I have mined. Once when Mr. Carey was working for me, building a cabin, we went back on a road that we were building a piece and came across a tree that had blown up and there was quartz sticking in the root of the tree. We got some and broke it up and it showed galena and silver ore in it. Where we found this ore is the place where the mines owned by Good & Roberts are, known as the Carey mines. I think we discovered this quartz about November, 1899.

Cross-examination:

The 243,000 feet of timber that was reported by Mr. Meyendorff, I cut in January, February and March, 1900. It was all cut in one place in Flemming Creek in township 8 north. My son cut the timber that was cut down in section 17. He had it cut. Some of my men might have cut a small amount of timber there also. I don't remember that.

71 RICHARD PLOWMAN, sworn as a witness for defendant, testified:

I am a son of the defendant, K. P. Plowman. I accompanied Governor Hunt and Mr. Fralick to the land which Mr. K. P. Plowman had cut over in township 8. This was some ten days ago. I showed them correctly as to the location of the cuttings of Mr. K. P. Plowman. The ground which I pointed out to them was the ground from which Mr. Plowman cut.

Here defendant rests.

L. L. SHARP, recalled as a witness for plaintiff in rebuttal, testified:

I have prepared a map showing the location of the timber cutting made by Mr. K. P. Plowman in townships 8 and 9 north, range 3 east, and their location with reference to the public surveys. This map now shown me is the one I prepared. It shows the location of

the land cut over by Mr. Plowman. The location in township 9 north, range 3 east, is approximate, the land being unsurveyed. On this map the squares marked "H'd Entry" indicate homestead entries which were made some time along in the year 1903. None of these entries had been made at the time Mr. Plowman did this cutting.

By the "entry" I mean filing upon the land in the Land Office.

72 I do not know the date the parties located or settled upon the land. Only I know it was prior to the survey or prior to the time the filings were made.

(Map offered in evidence by plaintiff for the purpose of illustrating the relative location of the lands from which the timber was cut by Mr. Plowman in townships 8 and 9 north, range 3 east. Admitted without objection as Plaintiff's Exhibit.)

Q. Mr. Sharp, point out to the jurors these lands cut over by Mr. Plowman as shown on this map.

A. The portion marked in green here is the land cut over in township 9 north or range 3 east. That is on the North Fork of the Payette. It was cut in 1903 and is termed the "later" or "North Fork cutting." The old cutting of 1899-1900 is down here in township 8 north of range 3 east on what is known as Flemming Creek. Inclosed in these red dots is the cutting on Flemming Creek. The other smaller inclosure in red dots indicates the cutting that was done about the same time as this cutting on Flemming Creek, and, as I understand it, that represents the 90,000 feet reported by Agent Meyendorff as having been cut by Mr. Plowman.

Witness continued:

This map shows the homestead entries of J. J. Faith and A. C. Leggett. The homestead of C. Allen Leggett is the southeast quarter of section 15, township 8 north, range 3 east. The homestead

73 of Mr. J. J. Faith is the east half of the southwest quarter and the south half of the southeast quarter of section 21, township 8 north, range 3 east.

(Here witness, at request of counsel, marks with a cross on the map the two homestead entries referred to.)

Witness continued:

I have been all over the lands shown on the map to have been cut over except that smallest portion in section 17. I have been over the portion included within the red boundaries and the red dots covering the surface on and along Flemming Creek. I was there about two weeks ago with Mr. E. J. Waters and Mr. James Phelps. We went for the purpose of making an examination of it for minerals. The country is of a blue granite formation and the only indication of mineral we found—I cannot locate it on the plat—but this Mountain Lion and other claims they have been referring to. There is one place where there has been a cow lick or deer lick alongside of the road, two or three feet deep and that has some stained clay in the hole, stained by some iron or some mineral and that is the first stain that I saw—this mineral stain. Then up this creek, I think it

's Flemming Creek or a branch of it. I found where there had been a tunnel. None of it except this lick is very near the land
74 which has been cut over. There is no mineral indication on the land that has been cut over. Mr. Watters and Mr. Phelps and myself went over the land looking for mineral with the result that we didn't find any indications. There are no excavations whatever on the land from which the timber was cut—excavations that have been made by man, only this little one I have referred to and which I called a "lick." That is the same lick referred to by Governor Hunt in his testimony. We discovered no other mineral indications at all on the land cut over.

Cross-examination:

This map and its colorings is made to indicate conditions as they now exist there, so far as the entries are concerned and not the conditions with reference to the entries existing at the time Mr. Plowman did the cutting. These entries marked here on the map on the east side of the river are the entries made beginning with 1903. This land was opened to entry some time in July, 1903. I do not claim to be a practical miner. I think I would know the indications of mineral. I have been working more or less at it in my capacity as special agent for the Government. I visited the ground for the specific purpose of looking over that from which the timber had actually been taken and for no other purpose, except I had remem-
75 brances of other prior suits, and I figured there might be something arise and I did make an examination of the surrounding country. My object was to find out whether or not there was mineral upon this ground. I found some stakes on a claim. I don't remember the name of it. I made an examination of that mine. I didn't take any assay of it. I could only give my opinion as to it. I don't know exactly what claim it was. I was speaking of a tunnel. I don't know what claim it is on. I was looking to see if it conflicted with the land cut over and I found it did not, and I paid no more attention to it except as to the workings on it. I made an examination. I examined all of them together.

By Mr. Ruick (U. S. attorney). We don't desire to shut off the cross-examination of the witness, but we simply desire to go upon the record as objecting. Our objection all the way through has been that any evidence of the mineralization of the land outside of the land actually cut over was incompetent, irrelevant, and immaterial. We have not examined this witness as to that ourselves, and we desire to make our objections lest we seem to be admitting that.

By Mr. Borah (for defendants). I want to know whether or not the witness is called to be a witness as to the mineralization of that vicinity.

76 By Mr. Ruick (U. S. attorney). We have not offered him for that purpose.

E. J. Waters, called as a witness on behalf of plaintiff in rebuttal, testified:

I have resided in Boise seven years. I have had experience as a miner and in examining and experting mines in Idaho, Wyoming, Mexico, Texas, Arkansas, Wisconsin and Michigan, and I consider myself competent to judge of the mineral character of a country of a section of country. I was with Mr. Sharp about two weeks ago when he made an examination of lands which he showed me as having been cut over by Mr. K. P. Plowman, the defendant in this case on Flemming Creek, as it is called.

Q. State what examination you made and with what result, confining yourself to the ground actually cut over by Mr. Plowman.

A. Why, we went up the gulch upon which the timber was cut looking for evidence of float, or any outcropping that might be visible the full length of the land that was cut over, and around the sides in places, and discovered nothing with the exception of a little opening alongside of the road made in a sort of alluvial deposit that had evidently been thrown up there by a spring of water of some kind.

77 The formation for the full length of the cutting is a blue granite. At the upper end of the cutting there is an eruptive formation crossing there that is a porphyry—might be termed a quartz porphyry; some would call it a trachite or diorite; it is eruptive, anyway; but I couldn't see anything that looked to me like evidence of mineral in it. In this opening alongside the road the clay in it was iron-stained a little; all the soil around there was stained a little bit with iron; but other than that there was no evidence of mineral.

Q. Nowhere on the land cut over?

A. Not that I could see; no, sir.

Q. That is what you were looking for, was it not, Mr. Waters?

A. Yes, sir.

Q. Had there been other indications of mineral there, do you think you would have discovered it?

A. Yes, sir, if there had been anything in sight there I could have seen it.

Q. If there had been a ledge of decomposed granite or quartz or porphyry, or any other rock cropping out on the surface, and mineralized, would you have seen it?

A. Yes, sir, if it had been exposed I would have seen it.

Cross-examination:

78 Speaking of the general appearance and formation of the country from which Mr. Plowman cut this timber; the west part of the cutting, or up there near the upper end of the canyon that leads from the river up there—the upper end of it is over the brow of a hill and on a sort of a flat; it is not perfectly flat, it is a little rolling, but it leads right up to the flat at the upper canyon. It is a high, elevated country. The canyon in which he cut the timber is of a rocky granite formation. The land has been covered with timber and there is a good deal of the formation exposed. I don't know whether it would be considered agricultural land or not. I

would not consider it in any sense a practical place to make a ranch. In my examination of the land from which the timber had actually been cut, I did not make any examination in the way of digging down or excavating it under the first soil, or covering. There was nothing exposed to the eye, nor in the croppings, which to me, as a mining man, would indicate mineral. The outward appearance of the land is something upon which a man would naturally depend to some extent. I examined the formation that was exposed, but did not uncover anything myself. I am not prepared to say that there was not actually a ledge in the ground or quartz formation carrying mineral where Mr. Plowman cut timber. I am only prepared
79 to say that as far as the naked eye goes, there was nothing there. There was no known mine that I could see.

And the above and foregoing was all the evidence introduced in said cause.

Whereupon the court, of its own motion, instructed the jury orally as to the law of said case as follows:

Gentlemen of the jury: On June 3, 1878, Congress, by an act, provided that all citizens of the United States and other persons bona fide residents of certain States, including Idaho and all other mineral districts of the United States, are authorized to fell and remove timber for building, agricultural, mining and other domestic purposes, growing on the public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry.

That now is the statute which we have to construe here, and upon which this action is based. I regret to say to you that this statute is not clear, and we do not know what the final construction of it will be. Some of the courts have construed it, but it never yet has been before the Supreme Court of the United States; and I am following and will follow in this instruction the rule as it has been laid down by this court heretofore and affirmed by the Circuit Court of Ap-
80 peals; and we will patiently wait until the matter finally gets before the Supreme Court, and that court will then determine what the law is.

I call your attention to one or two matters growing out of that statute. The first is that this privilege of felling and moving timber is granted to citizens of the United States or bona fide residents of the district or State in which the cutting occurs. It has been shown in this case that the defendant Plowman is both a citizen of the United States and a bona fide resident of this State; so far as that is concerned, he was justified in the cutting. Another matter which has been referred to is as to where the lumber may be sold or disposed of. The Secretary of the Interior has a rule upon that, but I instruct you that the law as it now stands is that where one is justified in cutting timber at all he is justified in selling or disposing of it anywhere within the State of Idaho.

Now I come to the important question in this cause, and the one about which I say there is doubt as to the meaning of the statute itself

as to what are mineral lands. This statute provides that one may cut timber on that which is mineral land. The contention of the Government seems to be, and that is its position in this case, that mineral lands within the meaning of this statute are only those lands
81 in which the mineral is actually found. That is, a party is justified in cutting timber only upon those lands which actually contain mineral. Now, there is in that, in my opinion, a fallacy which would render this law, if so constructed, a nugatory law. Land in which mineral is discovered, especially if it is valuable, is almost invariably taken up and located as a mining claim; and you may set it down as a rule that land which contains valuable mineral will be located as a mining claim.

When ground is once located as a mining claim, all the timber on that claim belongs to the locator or owner of the claim. If, then, you confine the cutting of timber simply to mining claims, or ground which contains mineral, you will see that nobody but the owners of mining claims can cut timber under this law. But when we turn to the law we find the law does not say that. It says all citizens and bona fide residents may have the privilege of cutting timber whether they own mining claims of not. So you will see that that construction cannot be consistently followed out. The law cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral or ground which is or which might be legally located as a mining claim. There must be some other construction, then, placed upon the law as to the meaning of mining ground
82 or mineral land. The question is, what is the meaning which we should place upon it. In defining that I give you the same instruction that I have used heretofore (Instruction No. 3). I instruct you that the law includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts, and all such neighboring lands as have the general characteristics of the mineral lands, even if mineral has not been actually discovered therein.

Perhaps I can make that plainer by illustration. We will suppose that upon the side of a hill there is dotted here and there along it mining locations and mineral developments. In other words, there is a ledge running along the side of the hill—a mineral-bearing ledge. Now, there may be, for a mile below that ledge or a mile above it, or even a greater distance than that, other ground in which there is no known ledge discovered. Yet the instruction conveys to your minds this idea, that that other ground is mineral land. In other words, you are not confined simply to the particular or narrow tract of land in which this ledge is found, but all the ground lying adjacent
83 to it and reasonably near it may be considered as mineral land.

Take, for instance, a large section of country, and I will, for the purpose of illustration, refer to the map which is before you. There in the lower part of the map, as you will see, is a section of

country about six miles square: the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous: they may even be some distance apart: but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground. To illustrate still further. You are all familiar, doubtless, with what is called Boise Basin, surrounding Idaho City. There is a large section of country, and in different portions of it mines are found, placer mines as well as quartz mines. There may be intervening portions of country there in which no mineral is found. Now, under the law, you are justified in considering all that ba-in, within a reasonable distance of where these mines are found, as mineral land.

Of course there is a limit to the extent to which you may go in that matter.

Counsel have represented here, in their own way, their views of the law, and wherein they conflict with the instructions of the Court, you will have to take the views of the Court instead of those of counsel.

81 We will suppose now that all the country which is in controversy here, indicated upon that map, contains no mineral: that it is simply a timber country or an agricultural country. Counsel argue that because there was no timber at a certain mining camp where this lumber from the ground in controversy was sold, distant some ten or twelve miles, that defendant might be justified in his cutting the timber for use in that distant camp where there is no timber. That is not the law. If that were the law, then people in a mining camp which had no timber might go a hundred miles away, or any distance away and cut timber. To justify cutting timber the land on which it grows must itself be mineral land: and you cannot, because you have a good mining camp at one place, go off a long distance and take timber from other ground which is not mineral land. In other words, you are limited to the section of the country where the mineral exists.

(Instruction No. 4.) To constitute a section of country a mining country the mineral deposits in it must be sufficient in quantity and in such numerous places and in such relation or proximity to each other as to constitute mining one of the important interests in the locality. Where we speak or think of a mining district or a mining section of country we generally have in our minds a country or

85 place where mining is a chief, or at least an important, interest—the business which gives character to the country and distinguishes it from an agricultural or other country: that is, a mining country is one which has sufficient of mining interests in it to be known as a mining country. A country which has simply here and there worthless prospects dotted around over it and which gives no value, character or tone to it cannot be denominated a mining country. So I say to you, in general, that before you can consider any section of the country a mining section and the land within it

mineral land, there must be enough mineral in it and it must occur with sufficient frequency to give some character, some tone and value to that section of the country.

(Instruction No. 5.) But you are not to conclude, gentlemen, that in order to make a mineral country there must always be mineral in it in paying quantities; in other words, it does not follow that to constitute a mining country there must be valuable mines there that are paying. It is true that in what we term a mining country we generally find more or less paying mines; and we find the great majority of the mines are not paying, that are valueless. The question is, taking the good and the bad altogether, whether it can be denominated a mining country.

I now read to you from an instruction given in another case
86 and which I think defines my ideas about as well as I can give them now. As I say, the laws themselves fix no limit as to what are mineral lands. They do not even say they must be more valuable for mineral than for other purposes. There is some argument to that effect here. The law does not make that distinction; it is therefore a subject for conjecture, one upon which opinions may and do differ. But I feel justified in saying to you that ground containing only a trace of mineral color, or containing it in such small quantities that a miner would not expect it ever to prove profitable, cannot be held as mineral ground; but when it contains sufficient to encourage the miner to claim and locate it as mining ground and to work and develop it in the reasonable expectation of finding ore in paying quantities, even if it never proved valuable, it is, within the law, mineral land. The question may arise, how are we to know the miner's opinion on those questions. My answer is, by his actions, by what he does, whether or not he locates the ground and continues to work it and develop it. I may say in this connection that an occasional location here and there over the country, which is not developed and not worked, is not such evidence as would constitute the entire country a mineral district; but the mining operations carried on must be such as to indicate that those who do locate claims and carry on the
87 work have faith in the country. I mean by that we cannot make the mere appearance of mineral in a country the excuse for claiming the whole country to be mineral land. There must be something substantial back of it in order to justify the claim that the country is mineral land.

Now, the question for you to decide first is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant, because if it is mineral country within the meaning of the law, he or any other citizen, or a bona fide resident of the State of Idaho, is entitled to go in there and cut the timber off of the land. But if you conclude it is not a mineral country within the meaning of the law,

as defined to you, then your verdict must be against the defendant. If you find in that way, the question then is what your verdict must be. As you have learned from counsels' discussion, there may be one of two verdicts. If the defendant went on that ground knowing that he had no right to go there, knowing that it was not mineral land, he then is what under the law is termed a willful trespasser, and, in that event, he would be liable to the Government for
88 the full value of the timber in the condition in which it was when the Government first took possession of it. Now, you will remember that a part of that was in lumber, forty-five thousand feet, of a certain value, which the witnesses have testified to be, I think, about eight or nine dollars a thousand feet. Your verdict, then, would be for the value of that lumber as the Government found it, at the rate of eight or nine dollars a thousand feet. They also say there was, I believe, five hundred and forty logs, equivalent to one hundred and eighty thousand feet of lumber. The Government could only claim the value of that in the logs at the place where the Government found the logs cut, and you will have to arrive at the value of those logs by the testimony which is before you. Then, in addition to that, there was another one hundred and fifty-two or three thousand feet in logs, and you would find the value of those logs as they were when the Government found them: that is, as they were found cut on the hills. In other words, if you find he was a willful trespasser you must find the value of the lumber and logs as they were at the time the Government took possession of the property.

The next proposition is as to whether he was an innocent trespasser. If you find he is an innocent trespasser, then there is a definite rule of damages to be applied. An innocent tres-
89 passer is one who does what he ought not to do, but in the belief that he had a right to do it. The question then presents itself to you as to whether the defendant, Mr. Plowman, at the time he cut this timber, believed he was justified under the law in cutting it. And it does not alone depend upon his belief or his statement of his belief, but the question is also to whether the facts and circumstances surrounding the case justified him in believing he had a right to cut the timber. Now, if you find that all of the facts and circumstances of the case justified him in believing that he had a right to cut it, and that he honestly and in good faith believed he had a right to cut it, and so cut it, then he is simply an innocent trespasser: and, in that event, you would find against him only the value of this timber as it stood upon the ground: that would be the stumpage value, and upon that you have the testimony of the various witnesses. They have put it, I believe, from a dollar and a half down to fifty cents: the witnesses of the Government, I think, stated a dollar and some a dollar and a half: you will remember the testimony: the witnesses for the defense ranged it, I think, from fifty to seventy-five cents, depending upon the circumstances. You will bear these different matters in mind.

Counsel for the defendant asks an instruction here, that the
90 statement of the Government officer to the defendant that he was a trespasser does not bind him. That is true. He is not bound by the opinion of a Government officer. He is bound by the facts that exist in the case, and he must act upon his judgment from the facts as they exist.

Counsel also asks me to instruct you upon another matter here. Any statement that the defendant made by way of a compromise cannot be considered against him. That is the law. Any admission or statements the parties made in view of having a compromise of this case or a settlement cannot be considered against him when it comes to the trial of the case.

I believe this covers all the points that are involved in the case.

I have two forms of verdict prepared for you. After the title of the cause, the first is, "We, the jury in the above-entitled cause find for the defendant." You have already learned that if you find that is mineral ground, your judgment must be for the defendant. If, on the contrary, you find it is not mineral ground, then some judgment must be recovered against the defendant, and that depends upon your conclusion.

If you find a verdict against the defendant, this is the form: "We, the jury, in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of blank dollars." If you find against
91 the defendant you will insert the amount which you find in this verdict.

You will select one of your number as foreman, and your foreman will sign the verdict that you agree upon.

Whereupon, upon the conclusion of the charge to the jury, given by the Court on its own motion, and before the jury had retired to consider their verdict, the United States Attorney, on behalf of the plaintiff, excepted specially and specifically to portions of said charge and stated the several matters of law in such charge, to which he excepted as follows, to wit:

1. Counsel for plaintiff excepts to that portion of the charge of the Court given to the jury in Instruction No. 2, in words as follows:

"The law (Act June 3, 1878) cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral or ground which is or which might be legally located as a mining claim."

2. Counsel for plaintiff also excepts to that portion of said charge included in Charge No. 3, reading as follows:

"I instruct you that the law (Act of June 3, 1878,) includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other land lying in reasonably close
92 proximity to or in the general neighborhood of such known mineral tracts, and all such neighboring lands as have the general characteristics of the mineral lands, even if mineral has not been actually discovered therein.

"Perhaps I could make that plainer by illustration. We will suppose that upon the side of a hill there is dotted here and there along it mining locations and mineral developments. In other words, there is a ledge running along this side of the hill—a mineral-bearing ledge. Now, there may be, for a mile below that ledge or a mile above it, or even a greater distance than that, other ground in which there is no known ledge discovered. Yet the instruction conveys to your minds this idea, that that other ground is mineral land. In other words, you are not confined simply to the particular or narrow tract of land in which this ledge is found, but all the ground lying adjacent to it and reasonably near it may be considered as mineral land. Take, for instance, a large section of country, and I will, for the purpose of illustration, refer to the map which is before you. There in the lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be con-
93 tiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground. To illustrate still further: You are all familiar, doubtless, with what is called Boise Basin, surrounding Idaho City. There is a large section of country, and in different portions of it mines are found, placer mines as well as quartz mines. There may be intervening portions of country there in which no mineral is found. Now, under the law, you are justified in considering all that basin, within a reasonable distance of where these mines are found, as mineral land."

Counsel for plaintiff also excepts to that portion of the charge included in charge No. 5 as given by the Court on its own motion, reading as follows:

"The laws (Act June 3, 1878,) themselves fix no limit as to what are mineral lands. They do not even say they must be more valuable for mineral than for other purposes."

Also to that other portion of said charge No. 5 reading as follows:

"Now, the question for you to decide first is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether the whole section of country surrounding that for miles around is what may be denominated a mineral
94 country. If you find it as a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant."

Whereupon at the conclusion of the charge given to the jury by the Court on its own motion, and before the jury retired to consider of their verdict, counsel for plaintiff requested the Court to charge the jury as follows:

INSTRUCTION NO. 1 ASKED FOR BY PLAINTIFF.

"To justify one in cutting and removing timber from the public lands under authority of the act of June 3, 1878, it is not sufficient

that the party show that the land from which the timber was cut is in the vicinity or neighborhood of, or adjacent to or adjoining, lands proved or conceded to be valuable for minerals, nor is it sufficient to show that the land from which the timber was cut presents the same or similar characteristics or natural features as other lands valuable for their minerals.

The defendant must show by a preponderance of the evidence that the land from which the timber was cut was and is mineral land, that is, valuable for minerals, and of such character as not to be subject to entry under any other laws of the United States except those relating to the location, working and patenting of min-
95 ing claims, and this should be made to appear by evidence of the actual discovery or production within the boundaries of the land actually cut over of minerals in sufficient quantity and of a character to make the land valuable for the mineral contained therein."

But to so charge the jury, the court then and there refused, and counsel for plaintiff then and there specially excepted to the refusal of the court to charge the jury as requested in said requested instruction No. 1.

Counsel for plaintiff then and there requested the court to charge the jury as follows:

INSTRUCTION NO. 2 ASKED FOR BY PLAINTIFF.

"The act of June 3, 1878, under which the defendant justifies the cutting of the timber in question in this case, in defining the land from which a citizen may cut and remove timber 'for building, agricultural, mining, and other domestic purposes,' makes use of the following language: 'Being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States except for mineral entry.'"

At the time of the enactment by Congress of the act of June 3, 1878, just referred to, the only lands reserved for mineral entry were those included in the descriptive words contained in section 2318, Revised Statutes of the United States—that is, "lands
96 valuable for minerals." Hence, I instruct you that it is only from lands valuable for minerals that the citizen may cut and remove timber by authority of the act in question.

Which request was refused by the court, whereupon counsel for plaintiff then and there specially excepted to the refusal of the court to charge the jury as so requested in said requested instruction No. 2.

Counsel for plaintiff then and there further requested the court to charge the jury as follows:

INSTRUCTION NO. 3 ASKED FOR BY PLAINTIFF.

"I further instruct you that the laws of the United States do not reserve lands from entry under other laws than those relating to entry

of mineral lands, simply because such lands are, or may be, claimed and worked as mineral lands. Such claim made, or work done, without actual evidence of the presence in the land of mineral in sufficient paying quantities to make the land 'valuable for minerals'—that is, profitable to work and extract the minerals therefrom, is insufficient to justify such cutting and removal."

But to so charge, the court then and there refused, to which refusal of the court to so charge, as set forth in said requested instruction No. 3, counsel for plaintiff then and there specially excepted.

97 Counsel for plaintiff then and there further requested the court to charge the jury as follows:

INSTRUCTION NO. 4 ASKED FOR BY PLAINTIFF.

The Land Department of the United States has adopted the rule that if the land is more valuable for agricultural than for mining it is not mineral land, although it may contain some measure of gold and silver. This is the only practical rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of profits that would or might result from mining under other and more favorable circumstances than those which actually existed or may be produced or expected in the ordinary course of such pursuit or adventure upon the land in question.

But to so charge, the court then and there refused, to which refusal of the court to charge the jury, as set forth in requested instruction No. 4, counsel for plaintiff then and there specially excepted.

Stipulation.

It is hereby stipulated, by and between counsel for plaintiff and defendant, respectively, that all objections made and exceptions reserved during the progress of the trial may be embodied in a bill

98 of exceptions or statement on motion for a new trial, to be prepared at the conclusion of the trial, such objection and exceptions to have the same force and effect as if embodied in a bill of exceptions at the time of trial.

It is further stipulated that either party may have sixty days within which to prepare and serve upon the opposing counsel such proposed bill of exceptions or statement on motion for a new trial, and that the opposing counsel may have twenty days thereafter in which to propose amendments thereto, and to prepare and serve amendments thereto.

The time provided for in the foregoing stipulation was further extended by order of court, duly made and entered November 22d, 1905, for a period of thirty days, pursuant to agreement of counsel had in open court.

To W. E. Borah and Wood & Wilson, attorneys for defendant:

The foregoing is the bill of exceptions proposed by counsel for plaintiff in the above-entitled action.

Dated December 18, 1905.

N. M. Ruick.
United States Attorney, Attorney for Plaintiff.

Service of the foregoing proposed bill of exceptions and the receipt of a copy thereof is hereby admitted this 8th day of December, 1905. Without any waiver of any rights in the premises.

Wood & Wilson and
W. E. Borah,
Attorneys for Defendant.

99 It is agreed that it is not the intention of the plaintiff herein, on this writ of error, to raise any question involving the observation by the defendant of the rules promulgated by the Secretary of the Interior as to the utilization of the trees or the disposition of the tops or involving the diameter of the trees cut.

It is agreed that the original maps introduced in evidence and used on the trial may be transmitted to the clerk of the Circuit Court of Appeals in accordance with the rules.

The above and foregoing bill of exceptions is hereby settled and allowed in the presence of the attorneys for plaintiff and defendant, this 24th day of January 1906.

Jas. H. Beatty,
Judge.

[Endorsed]: No. 31. In the Circuit Court of the United States, Central Division, District of Idaho. United States of America, Plaintiff, vs. K. P. Plowman, Defendant. Proposed Bill of Exceptions. Filed December 1, 1905. A. L. Richardson, Clerk. Refiled Jan. 24, 1906. A. L. Richardson, Clerk.

100 In the Circuit Court of the United States Within and for the District of Idaho, Central Division.

The United States of America, plaintiff,	
vs.	
K. P. Plowman, defendant.	

Petition for writ of error.

The plaintiff in the above-entitled cause, feeling aggrieved by the verdict of the jury and the judgment entered on the 25th day of September, 1905, comes now by N. M. Ruick, United States attorney, attorney for plaintiff, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the honorable, the United States Circuit Court of Appeals for the Ninth Circuit, sitting

at San Francisco, State of California, according to the laws of the United States in that behalf made and provided.

N. M. RUICK,
United States Attorney, District of Idaho, Attorney for Plaintiff.

[Endorsed]: No. 31. In the Circuit Court of the United States for the District of Idaho United States of America vs. K. P. Plowman. Petition for Writ of Error. Filed March 20, 1906. A. L. Richardson, Clerk.

101 In the Circuit Court of the United States, Central Division, District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

Assignment of errors.

In the matter of the petition of the United States of America for a writ of error.

Comes now the United States of America, the plaintiff herein, and files the following assignment of errors upon which it will rely:

I.

That the Court erred in permitting the introduction of the assay certificate, Defendant's Exhibit No. 6, showing the result of the assays of certain ore samples taken by witness, Edward Allen, from a mining claim known as the Reed claim; the evidence showing that the nearest portion of the land where the timber referred to in this action was cut to the Reed Claim from which the ore samples were taken was and is a distance of three-fourths miles.

II.

The Court erred in admitting in evidence the assay certifi-
102 cate marked Defendant's Exhibit No. 7, showing the assay value of certain ore samples taken from the surface of and from the dump on certain mining claims comprising land other than the land where the timber involved in this action was cut.

III.

The Court erred in admitting in evidence Defendant's Exhibit No. 8, being a map showing the outline of the country in the vicinity of the North Fork and Horse Shoe Bend and what is known as the Jerusalem country. Said map having been offered in evidence by

counsel for defendant for the purpose of showing the location of the different points testified to in relation to each other, including the location of mines and mining districts not situated on the land from which the timber involved in this action was cut.

IV.

That the Court erred in giving the following instruction during the course of the charge to the jury:

"The law (Act June 3, 1878) cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim."

V.

The Court erred in giving the following instruction to the
163 jury: "I instruct you that the law (act June 3, 1878) includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts, and all such neighboring lands as have the general characteristics of the mineral lands, even if mineral has not been actually discovered therein.

"Perhaps I could make that plainer by illustration. We will suppose that upon the side of a hill there is dotted here and there along it mining locations and mineral developments. In other words, there is a ledge running along this side of the hill—a mineral bearing ledge. Now, there may be, for a mile below that ledge or a mile above it, or even a greater distance than that, other ground in which there is no known ledge discovered. Yet the instruction conveys to your minds this idea, that that other ground is mineral land. In other words, you are not confined simply to the particular or narrow tract of land in which this ledge is found, but all the ground lying adjacent to it and reasonably near it may be considered as mineral land. Take for instance a large section of country, and I will, for the purpose of illustration, refer to the map which is before you. There in the
164 lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you in holding all that particular section of country to be mineral ground. To illustrate still further. You are all familiar doubtless with what is called Boise Basin, surrounding Idaho City. There is a large section of country, and in different portions of it mines are found, placer mines

as well as quartz mines. There may be intervening portions of country there in which no mineral is found. Now, under the law, you are justified in considering all that basin, within a reasonable distance of where these mines are found, as mineral land."

VI.

The court erred in giving the following instruction to the jury:

"The laws (act June 3, 1878) themselves fix no limit as to what are mineral lands. They do not even say they must be more valuable for mineral than for other purposes."

VII.

The court erred in giving the following instruction to the jury:

105 "Now the question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether the whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant."

VIII.

The court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"To justify one in cutting and removing timber from the public lands under authority of the act of June 3, 1878, it is not sufficient that the party show that the land from which the timber was cut is in the vicinity or neighborhood of, or adjacent to or adjoining lands proved or conceded to be valuable for minerals, nor is it sufficient to show that the land from which the timber was cut presents the same or similar characteristics or natural features as other lands valuable for their minerals.

The defendant must show by a preponderance of the evidence that the land from which the timber was cut was and is mineral land—that is, valuable for minerals, and of such a character as not to be subject to entry under any other laws of the United States
106 except those relating to the location, working, and patenting of mining claims, and this should be made to appear by evidence of the actual discovery or production within the boundaries of the land actually cut over of minerals in sufficient quantity and of a character to make the land valuable for the mineral contained therein."

IX.

That the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"The act of June 3, 1878, under which the defendant justifies the cutting of the timber in question in this case, in defining the land from which a citizen may cut and remove timber 'for building, agricultural, mining, and other domestic purposes,' makes use of the following language: 'Being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States except for mineral entry.'

"At the time of the enactment by Congress of the act of June 3, 1878, just referred to, the only lands reserved for mineral entry were those included in the descriptive words contained in section 2318, Revised Statutes of the United States—that is, 'lands valuable for minerals.' Hence, I instruct you that it is only from lands valuable for minerals that the citizen may cut and remove timber by authority of the act in question."

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X.

The Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"I further instruct you that the laws of the United States do not reserve lands from entry under other laws than those relating to entry of mineral lands, simply because such lands are, or may be, claimed and worked as mineral lands. Such claims made, or work done, without actual evidence of the presence in the land of mineral in sufficient paying quantities to make the land 'valuable for minerals,' that is: profitable to work and extract the minerals therefrom, is insufficient to justify such cutting and removal."

XI.

The Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error:

"The Land Department of the United States has adopted the rule that if the land is more valuable for agriculture than for mining it is not mineral land, although it may contain some measure of gold and silver. This is the only practicable rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of the profits that would or might result from mining under other and more favorable circumstances than those which
108 actually existed or may be produced or expected in the ordinary course of such pursuit or adventure upon the land in question."

Wherefore, the United States of America, plaintiff in error, prays that the judgment of the Circuit Court of the United States for the District of Idaho be reversed and that the said Circuit Court be directed to grant a new trial of said cause.

N. M. RUICK,
United States Attorney, District of Idaho,
Attorney for Plaintiff and Plaintiff in Error.

[Endorsed]: No. 31. In the Circuit Court of the United States, for the District of Idaho. The United States of America vs. K. P. Plowman. Assignment of Errors. Filed March 20, 1906. A. L. Richardson, clerk.

In the Circuit Court of the United States, within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
K. P. PLOWMAN, DEFENDANT.

109 *Order for writ of error.*

At a stated term, to wit, the March term, A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the District of Idaho, held at the court room in the City of Boise, State of Idaho, on the 20th day of March, in the year of our Lord one thousand nine hundred and six. Present: The Honorable James H. Beatty, judge.

UNITED STATES OF AMERICA,
vs.
K. P. PLOWMAN.

Upon motion of N. M. Ruick, Esq., United States Attorney, attorney for plaintiff, and upon filing a petition for a writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore, to wit, on the 25th day of September, 1905, entered herein.

JAS. H. BEATTY,
Judge.

(Endorsed): No. 31. In the Circuit Court of the United
110 States for the District of Idaho. United States of America vs. K. P. Plowman. Order for writ of error. Filed March 20, 1906. A. L. Richardson, clerk.

Writ of error from the Circuit Court of Appeals, Ninth Circuit, to the Circuit Court of the United States for the District of Idaho.

UNITED STATES OF AMERICA *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the District of Idaho, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you,

or some of you, between the United States of America, plaintiff, and K. P. Plowman, defendant, a manifest error hath happened to the great damage of the said plaintiff, the United States of America, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together
111 with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 7th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 20th day of March, in the year of our Lord one thousand nine hundred and six.

[SEAL.] A. L. RICHARDSON,
Clerk.

The foregoing writ is hereby allowed.

JAS. H. BEATTY,
Judge.

Service of the within and foregoing writ of error and receipt of a copy thereof is hereby admitted this 20th day of March, 1906.

W. E. BORAH and
FREMONT WOOD,
Attorneys for Defendant.

The answer of the judges of the United States Circuit Court of Appeals of the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we hereby
112 certify under the seal of our said court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place therein contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

[SEAL.] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 31. In the Circuit Court of the United States for the District of Idaho. United States of America vs. K. P. Plowman. Writ of Error. Filed March 20, 1906. A. L. Richardson, Clerk.

Citation.

UNITED STATES OF AMERICA *ss:*

The President of the United States to K. P. Plowman and W. E. Borah, Esq., and Fremont Wood, Esq., his attorneys, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the United States of America is plaintiff and you are defendant in error, to show
113 cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 20th day of March, A. D. 1906, and of the Independence of the United States the one hundred and thirtieth.

JAS. H. BEATTY,
United States District Judge, Presiding in the Circuit Court.

Attest:
[SEAL.] A. L. RICHARDSON,
Clerk.

Service of the foregoing citation, and the receipt of a copy thereof, is hereby admitted this 20th day of March, 1906.

W. E. BORAH and
FREMONT WOOD,
Attorneys for Defendant and Defendant in Error.

[Endorsed]: No. 31. In the Circuit Court of the United States for the District of Idaho. United States of America, Plaintiff, vs. K. P. Plowman, Defendant. Citation. Filed March 20, 1906. A. L. Richardson, Clerk.

114 In the United States Circuit Court, Ninth Judicial Circuit. District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR.

Clerk's certificate to transcript.

I, A. L. Richardson, clerk of the Circuit Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 89, inclusive, to be

full, true and correct copies of the pleadings and proceedings in the above-entitled cause which together constitute the transcript of the record and return to the annexed writ of error.

Witness my hand and the seal of said Circuit Court affixed at Boise, Idaho, this 22d day of March, 1906.

[SEAL.] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1328. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plain-
115 tiff in Error, vs. K. P. Plowman, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed April 10, 1906.

F. D. MONCKTON,
Clerk.

116 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Certificate of Clerk United States Circuit Court of Appeals to printed transcript of record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fifteen (115) pages, numbered from one (1) to one hundred and fifteen (115), inclusive, to be a true copy of the printed transcript of record upon writ of error to the United States Circuit Court for the District of Idaho, Central Division, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, this twenty-seventh day of February, A. D. 1908.

[SEAL.] F. D. MONCKTON,
Clerk.

117 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

(ADDENDA.)

Proceedings, etc., had in the United States Circuit Court of Appeals for the Ninth Circuit.

118 At a stated term, to wit, the October term A. D. 1906 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Friday the twelfth day of October in the year of our Lord one thousand, nine hundred and six.

Present: The Honorable William B. Gilbert, Circuit Judge, Honorable Erskine M. Ross, Circuit Judge.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Order of submission.

By consent of Messrs. N. M. Ruick and Fremont Wood, counsel for the respective parties to the above-entitled cause, ordered, cause submitted to Gilbert, Ross and Morrow, circuit judges, for consideration and decision on the briefs on file.

119 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Opinion U. S. Circuit Court of Appeals.

Upon writ of error to the United States Circuit Court, for the District of Idaho, Central Division.

Before Gilbert, Ross, and Morrow, circuit judges.

Ross, Circuit Judge, delivered the opinion of the Court:

It is conceded in the brief for the Government that the facts in this case are substantially identical with those presented in the cases of United States v. The Basic Company, 121 Fed., 504, and United States v. Rossi, 133 Fed., 380. And as the points of law again argued

by counsel for the Government in the present case were considered and disposed of by us in the cases cited, we affirm the judgment on the authority of those cases.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Feb. 4, 1907. F. D. Monckton, clerk.

120 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Judgment U. S. Circuit Court of Appeals.

In error to the Circuit Court of the United States for the District of Idaho.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Idaho, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed and entered February 4, 1907. F. D. Monckton, clerk.

121 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR.

Petition for writ of error.

The United States of America, plaintiff in error in the above-entitled cause, by Henry M. Hoyt, Solicitor-General, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment was rendered therein on the fourth day of February, 1907, affirming a judgment of the Circuit Court of the United States for the District of Idaho dismissing the complaint therein; that the matter in controversy in said suit exceeds $1,000 besides costs, to wit, the sum of $2,291.46; that the jurisdiction of none of the courts above mentioned is or was depending in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; that this case does not arise under the patent laws, revenue laws, or criminal laws, and that it is not an admiralty case; that it is a proper case to be reviewed

by the Supreme Court of the United States upon writ of error; and therefore the said United States of America respect-
122 fully prays that a writ of error be allowed in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors to be filed herewith may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

HENRY M. HOYT,
Solicitor-General.

JANUARY 31, 1908.

(Endorsed:) (Docketed) No. 1328. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, plaintiff in error, *vs.* K. P. Plowman, defendant in error. Petition for writ of error. Filed Feb. 12, 1908. F. D. Monckton, clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

123 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, plaintiff in error,
vs.
K. P. PLOWMAN, DEFENDANT IN error.
} No. 1328. Assignments of error.

And now comes the plaintiff in error, the United States of America, by N. M. Ruick, United States attorney, District of Idaho, its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the District of Idaho, entered on February 4, A. D. 1907, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said circuit court for a new trial.
124 Third. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of the assay certificate, Defendant's Exhibit No. 6, showing the result of the assays of certain ore samples taken by witness, Edward Allen, from a mining claim, known as the Reed claim; the evidence showing that the nearest portion of the land where the timber referred to in this action was cut to the Reed claim from which the ore samples were taken was and is a distance of three-fourths of a mile.

Fourth. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of the assay certificate, marked Defendant's Exhibit No. 7, showing the assay value of certain ore samples taken from the surface of and from the dump on certain mining claims comprising land other than the land where the timber involved in this action was cut.

Fifth. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of Defendant's Exhibit No. 8, being a map showing the outline of the country in the vicinity of the North Fork and Horse Shoe Bend and what is known as the Jerusalem country. Said map having been offered in evidence by counsel for defendant for the purpose of showing the location of the different points testified to in relation to each other, including the location of mines and mining districts not situated on the land from which the timber involved in this action was cut.

Sixth. Said Circuit Court of Appeals erred in sustaining the following instruction given by the trial court during the course of the charge to the jury:

125 "The law (act of June 3, 1878) can not be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim."

Seventh. Said Circuit Court of Appeals erred in sustaining the following instruction of the trial court to the jury:

"I instruct you that the law (act of June 3, 1878) includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts, and all such neighboring lands as have the general characteristics of the mineral lands, even if mineral has not been actually discovered therein.

"Perhaps I could make that plainer by illustration. We will suppose that upon the side of a hill there is dotted here and there along it mining locations and mineral developments. In other words, there is a ledge running along this side of the hill—a mineral-bearing ledge. Now, there may be, for a mile below that ledge or a mile above it, or even a greater distance than that, other ground in which there is no known ledge discovered. Yet the instruction conveys to your minds this idea, that that other ground is mineral land. In other words, you are not confined simply to the particular or narrow tract of land in which this ledge is found, but all the ground lying adjacent to it and reasonably near it may be considered as mineral land. Take for instance a large section of country, and I

126 will, for the purpose of illustration, refer to the map which is before you. There in the lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral loca-

tions. They may not be contiguous; they may even be some distan
apart; but you will be justified, under the law as I have given it
you in holding all that particular section of country to be miner
ground. To illustrate still further: You are all doubtless famili
with what is called Boise Basin, surrounding Idaho City. There is
large section of country and in different portions of it mines a
found, placer mines as well as quartz mines. There may be inte
vening portions of country there in which no mineral is found. No
under the law, you are justified in considering all that basin, with
a reasonable distance of where these mines are found, as miner
land."

Eighth. Said Circuit Court of Appeals erred in sustaining the fo
lowing instruction of the trial court to the jury:

"The laws (act of June 3, 1878) themselves fix no limit as to wh
are mineral lands. They do not even say they must be more valual
for mineral than for other purposes."

Ninth. Said Circuit Court of Appeals erred in sustaining the fo
lowing instruction of the trial court to the jury:

"Now, the question for you to decide is not whether the
127 little tracts on that map there—the ground cut over by t
defendant—contain mineral, but whether the whole section
country surrounding that for miles around is what may be denom
nated a mineral country. If you find it is a mineral country with
the meaning of the law as I have defined it to you, then your verdi
must be for the defendant."

Tenth. Said Circuit Court of Appeals erred in holding that t
following instruction to the jury, requested by plaintiff in error, w
properly refused:

"To justify one in cutting and removing timber from the pub
lands under authority of the act of June 3, 1878, it is not sufficie
that the party show that the land from which the timber was cut
in the vicinity or neighborhood of, or adjacent to or adjoining lan
proved or conceded to be valuable for minerals, nor is it sufficie
to show that the land from which the timber was cut presents t
same or similar characteristics or natural features as other lands v
uable for their minerals.

"The defendant must show by a preponderance of the eviden
that the land from which the timber was cut was and is mineral lan
that is, valuable for minerals, and of such a character as not to
subject to entry under any other laws of the United States exce
those relating to the location, working and patenting of mini
claims, and this should be made to appear by evidence of the actu
discovery or production within the boundaries of the land actually c
over, of minerals in sufficient quantity and of a character to make t
land valuable for the mineral contained therein."

128 Eleventh. Said Circuit Court of Appeals erred in holdi
that the following instruction to the jury, requested by plaint
in error, was properly refused:

"The act of June 3, 1878, under which the defendant justifies the cutting of the timber in question in this case, in defining the land from which a citizen may cut and remove timber for 'building, agricultural, mining and other domestic purposes,' makes use of the following language: 'Being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States except for mineral entry.'

"At the time of the enactment by Congress of the act of June 3, 1878, just referred to, the only lands reserved for mineral entry were those included in the descriptive words contained in section 2318, Revised Statutes of the United States, that is 'lands valuable for minerals.' Hence, I instruct you that it is only from lands valuable for minerals that the citizen may cut and remove timber by authority of the act in question."

Twelfth. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by plaintiff in error, was properly refused:

"I further instruct you that the laws of the United States do not reserve lands from entry under other laws than those relating to entry of mineral lands, simply because such lands are, or may be, claimed and worked as mineral lands. Such claims made, or work done, without actual evidence of the presence in the land of mineral in sufficient paying quantities to make the land 'valuable for
129 minerals', that is, profitable to work and extract the minerals therefrom, is insufficient to justify such cutting and removal."

Thirteenth. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by plaintiff in error, was properly refused:

"The Land Department of the United States has adopted the rule that if the land is more valuable for agriculture than for mining it is not mineral land, although it may contain some measure of gold and silver. This is the only practicable rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of the profits that would or might result from mining under other and more favorable circumstances than those which actually existed or may be produced or expected in the ordinary course of such pursuit or adventure upon the land in question."

Fourteenth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Wherefore, the said United States of America, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the said judg-
130 ment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the District of Idaho, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by

this honorable court, to the end that justice may be done in the premises.

N. M. RUICK,
United States Attorney, District of Idaho,
Attorney for Plaintiff in Error.

DATED, *January 6, 1908.*

131 (Indorsed:) Docketed C. 126657. F. 15571-03. Department copy. No. 1328. In the Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. K. P. Plowman, Defendant in Error. Assignments of error. Filed Feb. 12, 1908. F. D. Monckton, clerk. N. M. Ruick, U. S. attorney, District of Idaho, Boise, Idaho.

132 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
K. P. PLOWMAN, DEFENDANT IN ERROR. } No. 1328.

Certificate of clerk U. S. Circuit Court of Appeals to transcript of record upon return to writ of error from Supreme Court of the United States.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifteen (15) pages, numbered from one (1) to fifteen (15), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Court of Appeals for the Ninth Circuit, including the opinion of the court filed therein, as the same remain of record in my office, and that the same, in connection with the preceding certified copy of the printed transcript of record in the above-entitled case, constitute the transcript of record upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, this twenty-seventh day of February, A. D. 1908.

[SEAL.] F. D. MONCKTON,
Clerk.

133 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The United States of America,

plaintiff in error, and K. P. Plowman, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

134 *Return to writ of error.*

The answer of the judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

The United States Circuit Court of Appeals for the Ninth Circuit.

[SEAL.] By F. D. MONCKTON,
Clerk.

DATED, *February 27, 1908.*

Docketed No. 1328. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. K. P. Plowman, Defendant in Error. Writ of error (original). Filed February 12, 1908. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

135 UNITED STATES OF AMERICA, *ss:*

To K. P. Plowman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit wherein The United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this 31st day of January, in the year of our Lord one thousand nine hundred and eight.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

136 On this 7th day of February, in the year of our Lord one thousand nine hundred and eight, personally appeared Benj. W. Oppenheim before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Fremont Wood, Esq., one of counsel for K. P. Plowman, at Boise, Idaho, on the 7th day of February, A. D. 1908.

BENJ. W. OPPENHEIM.

Sworn to and subscribed the 7th day of February, A. D. 1908.

[SEAL.] A. L. RICHARDSON,
Clerk U. S. Dist. Court.

Docketed No. 1328. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. K. P. Plowman, Defendant in Error. Citation on writ of error (original). Filed February 12, 1908. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Indorsed on cover:) File No. 21058, U. S. Circuit Court Appeals, 9th Circuit, Term No., 310. The United States, Plaintiff in Error, vs. K. P. Plowman. Filed March 7th, 1908. File No. 21058.

O

[redacted]

No. [redacted] 96.

In the Supreme Court of the United States.

October Term, 1905.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

R. P. THOMAS.

IN ERROR TO THE [redacted] COURT OF [redacted].

MOTION TO ADVANCE.

In the Supreme Court of the United States

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN error,
v.
K. P. PLOWMAN.

No. 310.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and respectfully moves the court to advance the above-entitled case for hearing at the present term of court, and for grounds of motion submits the following:

The United States sued the defendant in trover for $2,294.46, the value of certain timber cut from public lands in the State of Idaho.

The defendant's answer, among other things, set up that he cut the timber under the license granted by the act of June 3, 1878 (20 Stat., 88), which permits residents of certain States and Territories, including Idaho, to fell and remove, for certain

purposes therein prescribed, any timber or other trees growing or being on the public lands, "said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry," in said States and Territories.

There was trial by jury and a verdict for the defendant.

The Government excepted to the charge of the court to the jury upon the construction of the statute, particularly as to what are "*mineral lands*" within the meaning of the act, and that is the essential question in the case. A portion of the charge (Rec., p. 36) is as follows:

> That now is the statute which we have to construe here, and upon which this action is based. I regret to say to you that this statute is not clear, and we do not know what the final construction of it will be. Some of the courts have construed it, but it never yet has been before the Supreme Court of the United States; and I am following and will follow in this instruction the rule as it has been laid down by this court heretofore and affirmed by the Circuit Court of Appeals; and we will patiently wait until the matter finally gets before the Supreme Court, and that court will then determine what the law is.

The judgment was affirmed by the Circuit Court of Appeals. (Rec., p. 54.)

More than one hundred cases, representing claims for large sums of money, are pending in

the courts of the United States involving precisely the question raised here. These cases are suspended awaiting the decision of this court in this case. The rights of those entitled to the license granted by the act are in great doubt and much litigation will probably be averted by a prompt determination of this case.

Opposing counsel concurs in this motion.

HENRY M. HOYT,
Solicitor-General.

JANUARY, 1909.

O

No. 96.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES, PLAINTIFF IN ERROR,

v.

E. P. THOMAS.

IN ERROR TO THE SUPREME COURT OF HAWAII FOR THE TERRITORY.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

UNITED STATES, PLAINTIFF IN ERROR,
v.
K. P. PLOWMAN.
No. 96.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This was an action by the United States, in the Circuit Court of the United States for the District of Idaho, to recover the sum of $2,294.16, the value, as alleged in the complaint (Rec., 1), of certain timber cut from the public domain in Idaho by the defendant in error, in the years 1899–1903, and converted to his own use. The land from which the timber was cut was described as being in townships 8 and 9 north, range 3 east, Boise meridian, and lying along the North Fork of the Payette River.

The defendant answered, admitting the cutting but setting up an affirmative defense, based upon the

act of June 3, 1878 (20 Stat., 88), which authorizes citizens of the United States and residents of certain States and Territories, including Idaho, and all other mineral districts of the United States, to fell and remove timber from the public lands for agricultural, mining, or other domestic purposes, "*said lands being mineral, and not subject to entry under existing laws of the United States except for mineral entry*," in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to certain rules and regulations to be prescribed by the Secretary of the Interior (Rec., 4–6).

The answer alleged that the defendant was a citizen of the United States and a bona fide resident of the State of Idaho; that he was operating a sawmill and manufacturing lumber during the years 1900, 1901, and 1902, and that he cut the timber from mineral lands of the United States for the purpose of manufacturing it into lumber for use in the State of Idaho (Rec., 4–5).

At the trial of the case the defendant made no serious effort to prove that the particular lands cut over were mineral in character and subject only to mineral entry, but confined his evidence almost entirely to proof of the mineral character of lands within from one-half to 11 miles of those cut over. A number of his witnesses testified to the existence of mines or mining claims of more or less doubtful value within the distances mentioned, but none testified to

the existence of any discovery or mine upon or immediately adjacent to the lands cut over, except the witnesses Faith (Rec., 20) and Fralick (Rec., 26). The testimony of ex-Governor Hunt (Rec., 29–32) and the defendant Plowman (Rec., 32) indicates that Faith and Fralick were mistaken as to the claims to which they referred (the Mountain Lion and Spinning Wheel, known as Roberts's claims and the Carey mines) embracing any of the ground cut over. Defendant's counsel, Mr. Borah (Rec., 16), only claimed that they were within half a mile of the place where the timber was cut.

Mr. Hunt, who went with the defendant's son and Fralick expressly for the purpose of examining the land cut over, testified that the only excavation and the only indication of ore he observed upon the land was a hole or lick where a ledge was exposed and from which some samples of ore were taken, of what value does not appear (Rec., 31).

There was testimony to the effect that the lands cut over were in a somewhat mountainous district, but it was also testified by the defendant's witnesses that there was agricultural country in the immediate vicinity of the lands cut over (Rec., 18, 21), and it appeared that several homestead entries had been made by the defendant's witnesses within the townships referred to in the complaint and in the neighborhood of the lands in question (Rec., 21, 22, and 33).

The testimony for the plaintiff in rebuttal, given by an agent of the Interior Department and an

experienced miner who accompanied him for the express purpose of examining the lands cut over, was, in substance, that that particular country was of a blue granite formation, high and elevated, and had been covered with timber, but without any indication of mineral thereon, except the hole or lick above referred to, where the soil was slightly stained with iron (Rec., 32–36).

The evidence leaves little doubt that the particular lands cut over were not mineral nor subject to mineral entry. This was of course a question for the jury, but the difficulty is that the court did not put this question to the jury, but instructed them that (Rec., 39)—

> The question for you to decide first is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant, because if it is mineral country within the meaning of the law, he or any other citizen, or a bona fide resident of the State of Idaho, is entitled to go in there and cut the timber off of the land.

The Government duly excepted to this and other similar instructions given by the court, and to the introduction of the evidence as to the character of land other than the tracts cut upon, as well as to the

refusal of the court to give certain other instructions which it requested upon the subject of mineral land within the meaning of the statute.

The jury returned a verdict for the defendant, upon which judgment was entered (Rec., 9).

The Circuit Court of Appeals affirmed the judgment upon the authority of its previous decisions in *United States* v. *Basic Company* (121 Fed., 504) and *United States* v. *Rossi* (133 Fed., 380). (Rec., 54.) Thereupon this writ of error was sued out.

ASSIGNMENTS OF ERROR (Rec., 56-59).

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the District of Idaho, entered on February 4, A. D. 1907, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid and in not remanding said cause to said Circuit Court for a new trial.

Third. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of the assay certificate, defendant's Exhibit No. 6, showing the result of the assays of certain ore samples taken by witness, Edward Allen, from a mining claim, known as the "Reed claim," the evidence showing that the nearest portion of the land where the timber referred to in this action was cut to the Reed claim from which the ore samples were taken was and is a distance of three-fourths of a mile.

Fourth. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of the assay certificate, marked defendant's Exhibit No. 7, showing the assay value of certain ore samples taken from the surface of and from the dump on certain mining claims comprising land other than the land where the timber involved in this action was cut.

Fifth. Said Circuit Court of Appeals erred in holding that it was proper to permit the introduction in evidence of defendant's Exhibit No. 8, being a map showing the outline of the country in the vicinity of the North Fork and Horse Shoe Bend and what is known as the Jerusalem country. Said map having been offered in evidence by counsel for defendant for the purpose of showing the location of the different points testified to in relation to each other, including the location of mines and mining districts not situated on the land from which the timber involved in this action was cut.

Sixth. Said Circuit Court of Appeals erred in sustaining the following instruction given by the trial court during the course of the charge to the jury:

> The law (act of June 3, 1878) can not be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim.

Seventh. Said Circuit Court of Appeals erred in sustaining the following instruction of the trial court to the jury:

> I instruct you that the law (act of June 3, 1878) includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts, and all such neighboring lands as have the general char-

acteristics of the mineral lands, even if mineral has not been actually discovered therein.

Perhaps I could make that plainer by illustration. We will suppose that upon the side of a hill there is dotted here and there along it mining locations and mineral developments. In other words, there is a ledge running along this side of the hill—a mineral-bearing ledge. Now, there may be, for a mile below that ledge or a mile above it, or even a greater distance than that, other ground in which there is no known ledge discovered. Yet the instruction conveys to your minds this idea, that that other ground is mineral land. In other words, you are not confined simply to the particular or narrow tract of land in which this ledge is found, but all the ground lying adjacent to it and reasonably near it may be considered as mineral land. Take, for instance, a large section of country, and I will, for the purpose of illustration, refer to the map which is before you. There in the lower part of the map, as you will see, is a section of country about 6 miles square; the upper part indicates another section 6 miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified under the law as I have given it to you in holding all that particular section of country to be mineral ground. To illustrate still further You are all doubtless familiar with what is called Boise Basin, surrounding Idaho City. There is a large section of country and in different

> portions of it mines are found, placer mines as well as quartz mines. There may be intervening portions of country there in which no mineral is found. Now, under the law, you are justified in considering all that basin, within a reasonable distance of where these mines are found, as mineral land.

Eighth. Said Circuit Court of Appeals erred in sustaining the following instruction of the trial court to the jury:

> The laws (act of June 3, 1878) themselves fix no limit as to what are mineral lands. They do not even say they must be more valuable for mineral than for other purposes.

Ninth. Said Circuit Court of Appeals erred in sustaining the following instruction of the trial court to the jury:

> Now, the question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether the whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law, as I have defined it to you, then your verdict must be for the defendant.

Tenth. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by the plaintiff in error, was properly refused:

> To justify one in cutting and removing timber from the public lands under authority of the act of June 3, 1878, it is not sufficient

that the party show that the land from which the timber was cut is in the vicinity or neighborhood of, or adjacent to or adjoining lands proved or conceded to be valuable for minerals, nor is it sufficient to show that the land from which the timber was cut presents the same or similar characteristics or natural features as other lands valuable for their minerals.

The defendant must show by a preponderance of the evidence that the land from which the timber was cut was and is mineral land; that is, valuable for minerals, and of such a character as not to be subject to entry under any other laws of the United States except those relating to the location, working, and patenting of mining claims, and this should be made to appear by evidence of the actual discovery or production within the boundaries of the land actually cut over of minerals in sufficient quantity and of a character to make the land valuable for the mineral contained therein.

Eleventh. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by plaintiff in error, was properly refused:

The act of June 3, 1878, under which the defendant justifies the cutting of the timber in question in this case, in defining the land from which a citizen may cut and remove timber for "building, agricultural, mining and other domestic purposes," makes use of the following language: "Being on the public lands, said lands being mineral and not subject to entry under the existing laws of the United States except for mineral entry."

> At the time of the enactment by Congress of the act of June 3, 1878, just referred to, the only lands reserved for mineral entry were those included in the descriptive words contained in section 2318, Revised Statutes of the United States, that is "lands valuable for minerals." Hence, I instruct you that it is only from lands valuable for minerals that the citizen may cut and remove timber by authority of the act in question.

Twelfth. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by plaintiff in error, was properly refused:

> I further instruct you that the laws of the United States do not reserve lands from entry under other laws than those relating to entry of mineral lands, simply because such lands are, or may be, claimed and worked as mineral lands. Such claims made, or work done, without actual evidence of the presence in the land of mineral in sufficient paying quantities to make the land "valuable for minerals," that is, profitable to work and extract the minerals therefrom, is insufficient to justify such cutting and removal.

Thirteenth. Said Circuit Court of Appeals erred in holding that the following instruction to the jury, requested by plaintiff in error, was properly refused:

> The Land Department of the United States has adopted the rule that if the land is more valuable for agriculture than for mining it is not mineral land, although it may contain some measure of gold and silver. This is the

only practicable rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of the profits that would or might result from mining under other and more favorable circumstances than those which actually existed or may be produced or expected in the ordinary course of such pursuit or adventure upon the land in question.

Fourteenth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

THE ACT OF JUNE 3, 1878.

(20 Stat., 88.)

CHAP. 150.—An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Approved, June 3, 1878.

ARGUMENT.

Question presented—The right to enter as mineral land the test of the right to cut.

The vital question in this case is whether Congress intended, by the act of June 3, 1878, to authorize the cutting of timber upon public lands generally within mineral districts, without regard to the mineral or non-mineral character of the particular land cut upon, or simply, as the act states, on public lands in such districts *which are mineral and not subject to entry under existing laws of the United States except for mineral entry.* In other words, whether the test as to the right to cut is to be that fixed by the statute or that supposed to be demanded by the necessities of the case.

Under the view taken by the Circuit Court and affirmed by the Circuit Court of Appeals, the restrictive words of the statute mean nothing, and the right to cut is made as broad as the locus designated to determine the beneficiaries of the act.

Congress extended the privilege conferred by the act to citizens of the United States and bona fide residents of the States and Territories mentioned, and to all other mineral districts of the United States. In describing the lands which might be cut upon, however, it provided that they must not only be in said States and Territories and other mineral districts, but must be mineral. Not only that, but, for no other apparent reason than to remove all

doubt on the subject, it was further provided that such lands must not be subject to entry under existing laws of the United States except for mineral entry. *The fact that the land was not subject to entry except as mineral land was therefore made the test of the right to cut timber thereon.* As will hereafter appear, at the time of the passage of the act of 1878, and since, the only public land not subject to other than mineral entry was such as was in fact valuable for minerals, and more valuable for mining than other purposes.

At the outset of its charge the Circuit Court said (Rec., 36):

> That, now, is the statute which we have to construe here and upon which this action is based. I regret to say to you that this statute is not clear, and we do not know what the final construction of it will be. Some of the courts have construed it, but it never yet has been before the Supreme Court of the United States, and I am following and will follow in this instruction the rule as it has been laid down by this court heretofore and affirmed by the Circuit Court of Appeals; and we will patiently wait until the matter finally gets before the Supreme Court, and that court will then determine what the law is.

We respectfully submit that the intention of Congress to limit the right to cut to land which is subject only to mineral entry is clear, and that the statutes and decisions leave no room for doubt as to the character of such land.

At the time of the passage of the act of June 3, 1873, and since, the only public lands not subject to entry under the laws of the United States except for mineral entry were those which were valuable for minerals, and more valuable for mining than other purposes.

Revised Statutes of the United States, chapter 4, title "Preemption:"

> SEC. 2258. The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of preemption, to wit:
>
> * * * * *
>
> Fourth. Lands on which are situated any *known* salines or mines.

Revised Statutes of the United States, chapter 5, title "Homesteads:"

> SEC. 2302. No distinction shall be made in the construction or execution of this chapter on account of race or color; *nor shall any mineral lands be liable to entry and settlement under its provisions.*

This section was from the act of June 21, 1866, section 1 (14 Stat., 66).

Revised Statutes of the United States, chapter 6, title "Mineral lands and mining resources:"

> SEC. 2318. In all cases *lands valuable for minerals* shall be reserved from sale, except as otherwise expressly directed by law.
>
> SEC. 2319. *All valuable mineral deposits* in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, *and the lands in which they are found to occupation and purchase*, by citizens of the

> United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2318 was from the act of July 4, 1866, section 5 (14 Stat., 86), and section 2319 from the act of May 10, 1872, section 11 (17 Stat., 91).

In *Deffeback* v. *Hawke* (115 U. S., 392), this court reviewed the above legislation of Congress and said (p. 404):

> It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which

> repealed that section and reenacted one of broader import, it is "*valuable* mineral deposits," which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. * * *

The substance of the holding in *Deffeback* v. *Hawke* was affirmed in the cases of *Davis's Administrator* v. *Weibbold* (139 U. S., 507, 517) and *Colorado Coal and Iron Company* v. *United States* (123 U. S., 307, 327).

The Land Department has held that mineral lands are such as are more valuable for mineral than for agricultural purposes, and that land is not subject to disposal under the mining laws unless discoveries of mineral of appreciable value have been made and as to which it appears that a further expenditure of labor or money would develop the presence of minerals in paying quantities. (2 L. D., 721; 5 L. S., 193; 6 L. D., 218; 6 L. D., 393; 7 L. D., 71; 7 L. D., 265; 8 L. D., 440; 9 L. D., 83; 25 L. D., 233, 247; 26 L. D., 100, 103.)

This ruling of the Land Department was substantially approved in *Davis, Admr.*, v. *Weibbold* (139 U. S., 507), cited below.

To the same effect are Snyder on Mines (vol. 2, sec. 143, p. 116); Lindley on Mines (1st ed., vol. 1, sec. 207, p. 251); *Alford* v. *Barnum* (45 Cal., 482); *Merrill* v. *Nixon* (15 Nev., 401).

In *Dughi* v. *Harkins* (2 L. D., 721), where there was a contest between mineral and agricultural claimants, Secretary Teller said (139 U. S., 522):

> The burden of proof is therefore upon the mineral claimant, and he must show, *not that neighboring or adjoining lands are mineral in character*, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, *but that, as a present fact, it is mineral in character;* and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. *He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value.*

The views expressed in this case were repeatedly approved and followed by Secretary Lamar and Secretary Vilas.

It is no answer to these decisions to say that they relate to contests by the agricultural and mineral claimants. They are cited merely for the purpose of showing that only lands which are in fact valuable for minerals are reserved from other than mineral entry, and they are pertinent in this case because the act of 1878 makes this fact the test of the right to cut timber on mineral lands.

In *Davis, Admr.*, v. *Weibbold* (139 U. S., 507), rulings of the Land Department upon applications for mineral patents were referred to with approval by this court. Such rulings, the court said, (id., p. 523–524)—

> * * * that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. *If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than other purposes*, which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear.
>
> * * * * *
>
> It would seem from this uniform construction of that department of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and State, whose attention has been called to the subject, *that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction.* The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated.

> There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback* v. *Hawke*, already referred to, and in the cases of the *Colorado Coal & Iron Co.* v. *United States* (123 U. S., 307, 328) and *United States* v. *Iron Silver Mining Co.* (128 U. S., 673, 683).

The court had previously said (id., p. 519):

> The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, *are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction*, and known to be so at the date of the grant. There are vast tracts of country in the mining States which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term mineral in the sense of this statute is applicable.

In view of the statutes and decisions referred to, it was clear error for the trial court to charge the jury that it was immaterial whether the particular tracts cut over contained mineral, and that the law did not require such land to be more valuable for mining than other purposes (Rec., 39).

Mineral lands, subject only to entry as such, can not properly be held to mean one thing in the statutes relating to the entry of such lands and another thing in the statute in question.

In order to apply the act of 1878, reference must necessarily be had to the legislation of Congress with respect to the exclusion of mineral lands from entry or sale except for mineral entry. As above shown, this legislation has received an interpretation which is settled beyond all question. Lands are not mineral, within the meaning of such legislation, unless they are known or can be shown to be valuable for minerals. If they do not in fact contain valuable mineral deposits, they are subject to entry under the homestead and other laws of the United States.

The court having given this construction to such legislation, it is precluded from giving it any other construction so far as the act of 1878 is concerned. Thus, in *United States* v. *Central Pacific Railroad Company* (118 U. S., 235), the court said (p. 240):

> This court having thus interpreted the act of July 1, 1862, we can not, consistently with the established rules of construction, give a different meaning to substantially the same words in the act of May 7, 1878. *Reiche* v. *Smythe* (13 Wall., 162). In the act of July 1, 1862, the provision is that "all compensation for services rendered for the Government shall be applied to the payment of said bonds." In the act of May 7, 1878, the words are that "the whole amount of compensation * * * for services rendered for the Government shall be retained by the

> United States," one half to pay interest and the other half to be turned into the sinking fund. *If the two acts are to be construed together and as one act, we must give the same meaning to like expressions in both.* We can not say in one case that the compensation mentioned means compensation only for services on aided roads and in the other that it includes compensation for services on roads not aided.

Unquestionably the legislation of Congress with respect to the entry of mineral lands is to be construed together with the act of 1878 as one act. The language of the latter act compels this to be done.

The language of the statute being clear and explicit, no construction which will defeat the obvious meaning of the language used is permissible.

The statute makes the right to cut timber dependent upon the land being mineral and subject only to mineral entry. The language is clear and specific and the words used are properly subject to but one meaning. This being so, they must be given their natural and legitimate effect.

Sutherland on Statutory Construction, section 237, page 312:

> "It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other

> means of interpretation. It is not allowable to interpret what has no need of interpretation."

It is true that a case may be within the letter of a statute and yet not within the statute, because not within its spirit (*Church of the Holy Trinity* v. *United States*, 143 U. S., 457); but here the effort is not to except a particular case from the operation of the rule laid down by the statute, but to nullify the rule entirely, apparently because too rigid within the view of the court.

The act of June 3, 1878, from the first, has been construed by the Land Department to authorize the cutting of timber only upon land which is in fact mineral.

On August 15, 1878, Secretary Schurz promulgated the first rules and regulations under the statute in question. They provided (Ann. Rep. Comr. Gen. Land Office, 1878, p. 119):

> With the view to and the intention of preserving the young timber and undergrowth upon the mineral lands of the United States, and to the end that the mountain sides may not be left denuded and barren of the timber and undergrowth necessary to prevent the precipitation of the rainfall and melting snows in floods upon the fertile arable lands in the valleys below, thus destroying the agricultural and pasturage interests of the mineral and mountainous portions of the country, I do hereby make and cause to be promulgated, by virtue of the power vested in me by the act entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories (except-

ing Washington Territory) to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations:

1. Section 2461, Revised Statutes, is still in force in all of the States and Territories named in the bill, and its provisions may be enforced, as heretofore, against persons trespassing *upon any other than lands which are in fact mineral*, or have been withdrawn as such; and in all cases where trespasses are committed upon the timber upon public lands which are not mineral, the trespassers will be prosecuted under said section.

* * * * *

In the case of *Frank P. Hardin* (1 Land Dec., 607), Secretary Teller had occasion to construe the act in question. It is to be observed, however, that he was dealing with the questions whether timber could be cut upon mineral lands for other than the personal use of the person cutting, and whether the right to cut was restricted to mineral claims. He held that the statute clearly authorized cutting for domestic use, and also that "to have restricted the inhabitants to the use of such timber as should be found on the mineral claims would have been folly, for in very many sections the mineral claims are destitute of timber."

We do not question the ruling of Mr. Teller on these points, nor the view expressed by him that Congress intended "to establish by positive enactment a right claimed and exercised without interference on the part of the Government for a period of

thirty years," if the right so claimed and exercised was simply to cut timber upon lands that were in fact mineral, and therefore subject only to entry as mineral land. We do dispute its correctness, however, if he is to be understood as saying that the right to cut extended to any land within a mineral district, without regard to whether the particular land was in fact mineral or not. Such a construction is negatived by the express language of the statute.

June 30, 1882, five days after the decision in the *Hardin case*, Secretary Teller issued rules and regulations under the act of 1878, which provided (1 Land Dec., 601–602):

> As the rules and regulations in relation to the cutting and removing of timber from the public mineral lands are modified, as hereinbefore stated, all agents and officers of this department are hereby instructed that in reporting cases of alleged trespass they will be governed in their report upon the mineral or nonmineral character of the land by the following general rule:
>
> Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, *in the absence of proof to the contrary*, will be held to be mineral in character; but where there are extensive valleys, plains, or mountain ranges, and no known minerals exist, the land may be considered and treated as nonmineral.
>
> Said agents and officers are further instructed that hereafter, in forwarding reports

> in cases of timber trespass, a simple statement to the effect that the lands in question are mineral or nonmineral in character will not be regarded by this office as sufficient proof; *evidence establishing that fact* must in all cases accompany and form a part of said report.

These instructions negative the broad interpretation attempted to be given Mr. Teller's language in the Hardin case. In effect, he rules that particular lands are to be deemed mineral if in known mineral districts, in the absence of proof to the contrary. He thus places the burden of proof upon the Government, rather than upon the individual, of the character of the particular lands cut upon. This does not seem to be justified by any fair construction of the act, and is contrary to the ruling of the courts on the subject; but it would still prevent the cutting of timber in a mineral district upon land which was not in fact mineral. It is very far from coinciding with the ruling of the court in this case that if the lands cut upon were in a mineral district or country it was immaterial whether they were not in fact mineral.

Secretary Teller's attitude is further indicated by his instructions to the Commissioner of the General Land Office of August 7, 1882 (1 Land Dec., 610), in which he said:

> First. The meaning of the words "all other mineral districts of the United States," found in the first section of chapter 150. The object of this chapter is so very evident that I do not think there can be any difficulty in determin-

> ing the meaning of these words. *The object of the act was to enable the inhabitants of said States and Territories to fell and remove the timber from that class of public lands withheld from the operations of the preemption and homestead laws*, which by existing laws they were not allowed to do.

The only lands withheld from the operation of the homestead and preemption laws were those which were in fact valuable for minerals. This brings Secretary Teller's attitude strictly in accord with that of his predecessor and successors.

On May 7, 1886, Secretary Lamar issued instructions under the act in question, which laid down the following rule (4 Land Dec., 521):

> The land from which timber is felled or removed, under the provisions of the act, must be known to be *strictly and distinctly mineral in character and more valuable for mining than for timber or for any other purpose or use.*

The regulations issued by Secretary Lamar under date of August 5, 1886, provided (5 Land Dec., 129):

> The land from which the timber is felled or removed under the provisions of the act must be known to be of a *strictly mineral character and that it is "not subject to entry under existing laws of the United States, except for mineral entry."*

This ruling continued in effect until May 5, 1891, when Secretary Noble issued rules and regulations with respect to the act approved March 3, 1891, entitled "An act to repeal timber culture laws, and for

other purposes," the third of which is as follows (12 Land Dec., 457):

> The act of June 3, 1878 (20 Stat., 88), authorizing the cutting of timber for building, agricultural, mining, and other domestic purposes, from public lands which are *known* to be mineral, and not subject to entry under existing laws of the United States except for mineral entry, is not repealed by this act, but remains in force subject to the rules and regulations prescribed thereunder by the Secretary of the Interior.

On January 18, 1900, Secretary Hitchcock issued rules and regulations with respect to the act of June 3, 1878, the second of which is as follows (29 Land Dec., 571):

> The land from which timber may be felled or removed under the provisions of this act must be known to be of a *strictly mineral* character and "not subject to entry under existing laws of the United States, except for mineral entry." Parties who take timber from the public lands under assumed authority of this act must stand prepared to show that their acts are within the prescribed terms of the law granting such privilege, the burden being on such parties of proving by a preponderance of evidence that the land from which the timber is taken is "mineral" within the meaning of the act.

The regulations of January 18, 1900, were in force until those issued by Secretary Ballinger on March 16, 1909, became effective May 1, 1909. The latter state:

> The attention of persons seeking the free use of timber is particularly called to the fact that this act does not authorize the cutting of timber from any lands subject to any form of nonmineral entry. The act applies only to lands subject to mineral entry. Lands subject to mineral entry are such lands as are known to contain such deposits of mineral as warrant a prudent person in expending his time or money in the reasonable expectation of developing a mine thereon.

It thus appears that, from the passage of the act of 1878 down to the present time, it has been construed by the Land Department of the Government charged with its administration to limit the right to cut to lands which are in fact mineral and not subject to other than mineral entry, as the statute in terms requires, and that Mr. Teller's instructions formed no exception. Under a well-settled principle, such construction is entitled to great weight and should not be disregarded except for the most cogent reasons.

> *United States* v. *Philbrick* (120 U. S., 52).
> *United States* v. *Johnston* (124 U. S., 236).
> *Robertson* v. *Downing* (127 U. S., 607).
> *Hastings, etc., Railroad Company* v. *Whitney* (132 U. S., 357, 366).
> *Merritt* v. *Cameron* (137 U. S., 542).

The Timber and Stone Act.

On the very day that the act in question was approved, June 3, 1878, the timber and stone act was also approved (20 Stat., 89). That act authorized the sale of lands in the States of California, Oregon,

Nevada, and in Washington Territory, chiefly valuable for timber and stone, at the minimum price of $2.50 an acre. It provided, however (Sec. 1), that nothing therein contained should "authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal." It also required an applicant for the purchase of land thereunder to make affidavit and prove that it contained no mining or other improvements, nor any *valuable* deposits of gold, silver, cinnabar, copper, or coal (Secs. 2 and 3).

It is manifest that the timber and stone act and the act in question in this case are in *pari materia*. The latter applies to citizens and residents of "the States of Colorado, *Nevada*, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, *and all other mineral districts of the United States*." The timber and stone act originally applied to the States of California, Oregon, and *Nevada*, and Washington Territory. It was afterwards extended by the act of August 4, 1892 (27 Stat., 348), to all the "public land States."

It will be observed that the timber and stone act, as originally enacted, and the act in question both mentioned the State of Nevada. The provision of the act in question that it should apply to all other mineral districts of the United States would, of course, also make it applicable to such districts in the other States referred to in the timber and stone act.

There is no inconsistency whatever in the two statutes if construed as the Government contends they should be construed. The timber and stone act expressly excludes lands containing valuable mineral deposits from its operation. The act in question only authorizes the cutting of timber upon mineral lands not subject to entry under existing laws except for mineral entry. As above shown, this necessarily means lands which contain valuable mineral deposits. If, however, the construction placed upon this statute by the lower courts be upheld, all lands in the mineral districts in the public-land States may be entirely denuded of timber by residents of such districts, without cost, although they contain no valuable mineral deposits, but could be sold at the minimum price of $2.50 an acre under the provisions of the timber and stone act. Manifestly, that construction of the statute in question should be adopted which places it entirely in harmony with the timber and stone act, rather than one which presents the anomaly referred to.

Assuming, however, for the sake of argument, that the timber and stone act was not intended to apply to any lands within a mineral district, the situation is still not met, because the act under consideration unquestionably contemplates the application of the homestead and other laws in such districts. This is illustrated, practically, by the fact that several homestead entries have been made within the mineral district referred to in this case.

The fact, however, that both these statutes mention the State of Nevada—the act in question referring to it as a mineral district—seems absolutely to negative the idea that the timber and stone act was not to operate in a mineral district. Its subsequent extension to the State of Idaho—also classed as a mineral district by the act in question—carries with it a like implication.

United States v. Basic Company (121 Fed., 504) and United States v. Rossi (133 Fed., 380).

We do not concede, as was done in the Circuit Court of Appeals, that the facts in this case are substantially identical with those presented in the Basic Company and Rossi cases.

In *United States* v. *Rossi*, it was merely held that evidence as to the mineral character of land a mile and a half distant from the land cut over was admissible for the purpose of showing the extent of the mineral district. We do not question the correctness of this view.

In *United States* v. *Basic Company*, the instructions given by the trial court were similar to those given here, but the ruling of the Circuit Court of Appeals is somewhat qualified by the facts of the case.

As the Court of Appeals pointed out in that case most, if not all, of the lands from which the timber was cut was classed as mineral by the miners of that vicinity and in the return of the surveyor-general, and in addition the record showed it was nearly all valuable placer land, and was subsequently taken up

as such. In the present case there is no evidence to the effect that the land in question was ever classified as mineral land upon the public surveys or by the Land Department, or by miners, or that it was in fact mineral. On the contrary, the evidence indicates that the land is not in any proper sense mineral land.

United States v. Edwards (38 Fed., 812) and United States v. Richmond Mining Co. (40 Fed., 415).

In *United States* v. *Edwards* the District Court for Colorado found, from the statement of facts, that the lands cut over had been classified as mineral by the Land Department upon the authority of government surveys; that they were in a mountainous region, in the vicinity of valuable mines, and had some indications of valuable metals in them, and that they were unfit for cultivation or pasturage, and were not subject to entry under the preemption and other laws relating to agricultural land.

In *United States* v. *Richmond Mining Company* a similar finding was made by the Circuit Court for Nevada.

In other words, in both of those cases, the court applied the test prescribed by the statute, making the fact of the lands being valuable for minerals and subject only to mineral entry the criterion of the right to cut. This was not so in the present case, the jury not being permitted to determine whether the lands cut over contained minerals or were more valuable for mining than for

agriculture (Rec., 49, 59). The jury were instructed that the character of the particular lands cut over was immaterial if they were surrounded by what might be termed a mineral country (Rec., 39).

Authorities directly sustaining the Government's position.

In *United States* v. *Legg* (apparently not otherwise reported than in the Compilation of Public Timber Laws and Regulations and Decisions thereunder, issued by the Secretary of the Interior under rule of February 14, 1903), the District Court for the Fourth Judicial District of the Territory of Montana, in an action similar to this, delivered the following instructions:

> 1. Agricultural lands are those lands that are capable of being brought under a state of cultivation, for the production of grain, grass, or vegetable of any kind that may be grown in this climate, and which are not known to contain any *valuable* deposits of coal or any of the precious metals, such as gold, silver, lead, cinnabar, or other valuable minerals.
>
> 2. Coal lands are those lands which are chiefly valuable for the coal known to exist therein.
>
> 3. Mineral lands are those lands which are chiefly valuable for the minerals (except coal) which they contain, and *which are more valuable for the minerals therein contained than they are as agricultural lands or for the timber growing thereon.* Mineral lands are not subject to entry under the general land laws of the United States, but can only be located and

entered as mines and mining claims under the act of May 12, 1872. Upon such lands persons who are citizens and residents of the United States and the Territory may cut and remove therefrom the trees and timber growing thereon for domestic, agricultural, or mining purposes. But this right to cut timber from mineral lands does not give any right to persons to go upon the public coal lands or agricultural lands of the United States and cut and carry away the timber thereon.

4. The authority granted by the act of June 3, 1878, to cut timber applies exclusively to lands *which are strictly mineral in character and subject to mineral entry only.* The defendant must prove by a preponderance of evidence that such lands are more valuable for the mineral than for any other purpose and that they are not suitable for agricultural purposes or cultivation, or valuable solely for the timber thereon.

5. In this case the burden of proving the character of the land from which this timber was cut or taken by the defendants rests upon the defendants; and unless the defendants have proven by a preponderance of the evidence on that point that the land from which this timber was cut and taken is mineral land and subject to entry only as mineral lands, then they can not justify their entry on said land and the cutting and carrying away of said timber.

Had similar instructions been given in this case, the jury would doubtless have returned a verdict for the Government.

In *United States* v. *Copper Queen Consolidated Mining Co.* (60 Pac. Rep., 885), also a suit to recover the

value of timber alleged to have been unlawfully cut from the public domain, the trial court charged the jury as follows (p. 886, 887):

> Proof of the existence of some measure of minerals in the lands from which the timber was cut, or proof of traces, indications, or possibilities that said land contained valuable mineral deposits, or that the lands in question are high, rugged, rough, and precipitous, can not in itself impress said lands with a mineral character. *Mineral in sufficient quantities to justify exploration and development, and in quantities which it will pay to work, must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut under the act of June 3, 1878.* The mere fact that portions of the land from which the timber was cut contained particles of gold or other valuable mineral deposits, or veins of gold-bearing quartz, would not necessarily impress it with the character of mineral land as herein defined, and within the meaning of the act of June 3, 1878. *It must, at least, be shown that said lands contained metals in quantities sufficient to render it available and valuable for mining purposes.*

Of these instructions the Supreme Court of Arizona said (id., p. 887):

> These instructions embrace a full and accurate definition of the term "mineral land," as used in said act of Congress and other statutes of the United States.

In *United States* v. *Dodge* (Comp. of Pub. Timber Laws, Regulations, and Decisions, supra, p. 180), the District Court of Nez Perce County, Idaho Territory, charged the jury (p. 181):

> In this case the defendants claim that the land is mineral land. *By mineral lands is meant such land as is more valuable for mining than for agricultural purposes, and the burden of proving its mineral character devolves upon the defendants;* so also is the burden on the defendants of proving that they cut the same for domestic or other lawful purpose.

In *United States* v. *Price Trading Company* (109 Fed., 239), the Circuit Court of Appeals affirmed the judgment of the Circuit Court, notwithstanding certain error in its charge to the jury, upon the ground that the cutting of timber referred to in that case was authorized by the act of 1878, and the regulations of the Secretary relating to the keeping of a record of the timber cut and removed under the authority of that act applied only to those engaged in operating sawmills. The question as to whether the lands from which the timber was cut was mineral land within the meaning of the statute does not appear to have been considered by the majority of the court. Judge Sanborn, in his dissenting opinion, goes fully into this question and holds that the defendants had not justified the cutting of the timber under the act of 1878. He said in part (pp. 250–251):

> It does not appear from this record that the defendants have conclusively established or that they can conclusively prove their defense

under the act of 1878, so that the United States can not recover the value of the 7,000 posts. In the first place, they failed at the former trial to produce any evidence whatever to establish one of the indispensable conditions of their right to these posts, namely, that the land from which they were taken was "not subject to entry under existing laws of the United States, except for mineral entry." *In the second place, the evidence which they presented of the mineral character of the land was so general, unsatisfactory, and illusory that it can not be said that the minds of all reasonable men would be compelled thereby to conclude that the posts were taken from mineral land. It consisted of the testimony of two witnesses, who acknowledged that they did not know from what land the posts were taken, to the effect that in some places on lands from 4 to 14 miles northwest of Price there were veins of coal and traces of the precious metals, but there was no testimony that there was either coal or ore on any of the tracts of land from which* any of the posts in controversy were taken. From this evidence a jury might well find, and ought to find, that the mineral character of the land from which these posts were taken was not established.

The similarity of the facts in this case to those of the Price Trading Company case will be remarked.

This court has held that the right to cut timber is exceptional and the statute must be strictly complied with.

In *Northern Pacific Railroad* v. *Lewis* (162 U. S., 366), this court held that a person justifying the cut-

ting of timber on the public lands under the act of 1878 must bring himself strictly within the provisions of the act. Speaking by Mr. Justice Peckham, the court said (pp. 376–378):

> The absolute ownership of these lands being at the time in the United States, it has as owner the same right and dominion over them as any owner would have. No one had the right to enter upon the lands; no one had the right to cut a stick of timber thereon without its consent. Anyone so going upon the lands and cutting timber would be guilty of the commission of an act of trespass. The Government, however, chose to make some exceptions in favor of certain classes of people to whom were given the right to cut timber for certain purposes: First, they were to be citizens of the United States. Second, bona fide residents of the State or Territory mentioned in the act. *Third, they were to be permitted to fell and remove any timber or trees growing or being on the public lands, provided they were mineral and not subject to entry under existing laws of the United States;* and they were authorized and permitted to fell and remove such timber only for building, agricultural, mining, or other domestic purposes. The cutting and removing were to be done under rules and regulations prescribed by the Secretary of the Interior. *Outside of these exceptions there was no right in any person to cut a particle of timber on these public lands of the Government.*
>
> *The right to cut is exceptional and quite narrow and for specified purposes only. The*

broad general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. *The presumption in the absence of evidence is that the cutting is illegal.* (*United States* v. *Cook*, 19 Wall., 591.)

* * * * *

Again, the consent to cut timber granted by the act of 1878 being upon the conditions and for the purposes therein specified and to the classes of persons therein described, whether the plaintiffs who did this cutting had complied with those conditions and had cut timber for the purposes mentioned and were within the class of persons described in the statute, were facts which rested peculiarly within their own knowledge, the burden of showing which would naturally and rightfully be cast upon them. As the plaintiffs failed to show that they came within the conditions and exceptions specified in the act of 1878, the presumption that they cut the timber illegally became conclusive. * * * It is simply a question whether the plaintiffs have brought themselves within any of the exceptions provided for in the statute of 1878, and *we hold that the burden was upon them to show the facts which constituted the exception* if they existed.

There is no doubt as to what are mineral lands within the meaning of the statute; the question is simply as to the extent of proof necessary.

The right to cut timber extends only to lands which are mineral and not subject to other than mineral entry. Lands valuable for minerals, and more valu-

able for mining than other purposes, are the only lands which fall in this category. The question in a given case is, therefore, simply one as to the nature and amount of proof required to show that the lands cut over are valuable for minerals." Upon this point, the Government requested the following instruction (Rec., 42–43, Tenth Assignment of Error):

> To justify one in cutting and removing timber from the public lands under authority of the act of June 3, 1878, it is not sufficient that the party show that the land from which the timber was cut is in the vicinity or neighborhood of, or adjacent to or adjoining, lands proved or conceded to be valuable for minerals, nor is it sufficient to show that the land from which the timber was cut presents the same or similar characteristics or natural features as other lands valuable for their minerals.
>
> The defendant must show by a preponderance of the evidence that the land from which the timber was cut was and is mineral land; that is, valuable for minerals, and of such character as not to be subject to entry under any other laws of the United States except those relating to the location, working, and patenting of mining claims, and this should be made to appear by evidence of the actual discovery or production within the boundaries of the land actually cut over of minerals in sufficient quantity and of a character to make the land valuable for the mineral contained therein.

Section 2320 of the Revised Statutes provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the

claim located." It would seem to follow, therefore, that mineral land is not subject to mineral entry, and therefore not within the act of 1878 as to cutting timber thereon, unless a discovery of the vein or lode therein is shown.

"Discovery," within the meaning of section 2320, is said to exist when a locator finds rock in place containing mineral in sufficient quantities to justify him in expending his time and money in developing the vein, whether the rock or earth is rich or poor, whether it assays high or low; the finding of the mineral in the rock in place as distinguished from float rock (3 *Words and Phrases Judicially Defined*, p. 2094; 5 *Fed. Stat. Annot.*, p. 10). "Mere indications, however strong, are not * * * sufficient to answer the requirement of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim." (*Nevada Sierra Oil Coal Company* v. *Home Oil Company*, 98 Fed., 675–676.)

The court refused to give the above instruction and instead charged the jury that it was unnecessary for them to determine whether the particular tracts cut over contained mineral, but it was sufficient if they were in the neighborhood of, or surrounded by, what it termed mineral country (Rec., 39). Mineral country had been defined by it to be a section of country in which the mineral deposits were "sufficient in quantity and in such numerous places and in such relation or proximity to each other as to constitute

mining one of the important interests in the locality" (Rec., 38).

The court further charged the jury that the law was not limited to ground known to contain mineral, or which might be legally located as a mining claim, but the jury were advised that land within a reasonable distance of known mineral land and possessing the same general characteristics was also to be regarded as mineral land, although no mineral had actually been discovered therein (Rec., 37). What it meant by a reasonable distance appeared from the illustrations which it gave to be a mile, or "even a greater distance than that," from known mineral land (Rec., 37). Mineral land, as defined by it, would include "intervening portions of country in which no mineral is found" (Rec., 38).

The court thus eliminated the mineral character of the lands cut over from the consideration of the jury, and in effect instructed them that timber could be cut upon the public lands anywhere in a mineral district.

It is not insisted that the fact that land from which timber is cut may possess the general characteristics and be in the vicinity of land known to contain valuable minerals is not entitled to consideration in determining the character of the land cut upon. We submit, however, that such circumstance can not properly be held conclusive in the face of the restrictive language of the statute. To do so would be to permit the cutting of timber upon all public lands within known mineral districts, which the statute

clearly does not allow. As pointed out by this court in *Northern Pacific Railroad* v. *Lewis, supra* "the right to cut is exceptional and quite narrow," and "the broad general rule is against the right."

We contend that the inquiry in each case is just what the court said it was not, namely, whether the land cut over contains minerals and is valuable therefor. We do not contend that the actual production of minerals within the boundaries of the land cut over is necessary. A discovery would be sufficient, and possibly such indications of the presence of valuable minerals in the land cut over as, taken in connection with the proximity of the land to land known to contain valuable minerals and the similarity of the two tracts in general, would justify a reasonable man, having some familiarity with the subject, in expending his time and labor for the purpose of exploring and purchasing the same as a mining claim. Even under the latter view the instructions of the trial court in this case were plainly erroneous.

Morgan v. United States (169 Fed., 242).

In *Morgan* v. *United States* (169 Fed., 242) the District Court for Colorado followed its ruling in the *Edwards* case, *supra*. It charged the jury (pp. 247–248):

> Now, before you can find that this defense, to the effect that the defendant had a right to take the timber because it was on mineral lands, has been sustained, you must find that

those lands were valuable for minerals. That, however, does not mean, gentlemen of the jury, that there must be positive proof that they have been worked or can be worked at a profit for the mineral they contain. If the mineral indications are such on these lands as would justify a reasonable and prudent person who has had some experience and has knowledge in that sort of thing to spend his money and labor on these lands for the purpose, and in the hope, and in the honest belief that he could work them at a profit, that would be sufficient evidence to justify you in finding that these were valuable mineral lands. In that connection, also, it is proper for you to take into consideration any evidence of lands adjoining or near that contain valuable minerals and are valuable for their minerals. *It does not, however, conclusively follow that because there may be a claim near by that is valuable for its mineral, that, therefore, necessarily, these lands are likewise valuable*, but these are facts for you to take into consideration in determining whether or not these lands are valuable for mineral; but before you can sustain this defense you must arrive at the conclusion, from the evidence, that the land from which this timber was cut was valuable for its minerals. A mere finding of *some* value in the mountainous section of this State in a particular piece of land does not indicate that that piece of land is valuable for its mineral deposits; that, I take it, is common knowledge to almost every citizen of the State of Colorado.

The court refused [redacted] charge [redacted] the jury as follows (p. 248):

> I charge you that lands of a rocky, broken character, lying reasonably near lands in which mineral has actually been discovered, and which is so like it in general appearance that miners would be justified in prospecting it in the expectation of discovering mineral, should be classified as mineral lands under this act.
>
> It is not altogether a question of finding valuable ore or metal in the ground from which the timber is taken. The act of Congress is not limited to land which is or may be actually occupied for mining purposes.

We think the District Court in that case gave the broadest exposition of the law possible. To have gone further, as requested by the defendant, and as was done in this case, would be to ignore entirely the limitations of the right to cut prescribed by the statute. It is true, the Circuit Court of Appeals for the Eighth Circuit, following the decision of the like court for the Ninth Circuit in the *Basic Company* and *Rossi* cases, held the instructions of the trial court erroneous, although admitting that they contained some element of truth. An analysis of the opinion of the Circuit Court of Appeals in that case, however, will show that the latter court was itself in error in construing the instructions given by the trial court.

The construction contended for by the Government is not unjust or unreasonable.

The construction contended for on behalf of the Government is a reasonable one. It conforms to the manifest purpose of the statute, and is in entire harmony with the practical interpretation thereof by the Land Department from the time of the passage of the act, not even excepting Secretary Teller's construction. It causes no hardship to residents of mineral districts, who, even if they innocently overstep the limitations prescribed by the act as thus interpreted, are liable only for the stumpage value of the timber taken by them, which presumably would be worth that much to them. The express language of the statute forbids them from assuming that they can cut timber upon public lands in a mineral district merely because such land is within a mile or more of known mineral land. They are put on inquiry by the statute itself as to whether the land over which they desire to cut is of such a character as to make it subject only to mineral entry. If there be no discovery, and certainly if there are no indications upon the land cut over of the presence of valuable minerals, the mere fact that it is in the neighborhood of known mineral lands is clearly insufficient to justify the cutting. But if persons do cut under such circumstances as would justify the assumption that the land cut over is within the statute, although in fact it is not, they only pay for what they get. It might be asked, under what circumstances a man could be an innocent trespasser in a case

of this kind, if the mere fact that the land cut over is within the neighborhood of known mineral land, although not appearing in itself to be valuable for minerals, nor being so in fact, would absolutely justify the cutting. Such construction leaves no room for innocent trespassers. The cutting would either have to be willful or justifiable.

The statute is to be construed in the light of conditions existing at the time of its passage.

The attitude of the trial court was plainly inspired by the thought that, unless the statute were construed to be broader than its language indicated, the privilege which it sought to confer would be unduly restricted owing to the fact that lands appearing to be valuable for minerals were usually taken up as mining claims. But the act is to be construed in the light of the conditions which existed at the time of its passage. Thirty-one years ago there were vast areas of valuable mineral lands in Idaho and the other States and mineral districts referred to which had not been explored or entered as mineral claims. It was to such areas that the statute in question referred. The prospector, ordinarily, would not have sufficient money to enter all the valuable mineral land in sight. It required an expenditure of $500 in improvements and the payment of $5 per acre before a lode claim could be entered. Beyond a doubt, therefore, there was abundance of land valuable for its minerals upon which timber might be cut at the time of the passage of the act of 1878.

It is immaterial if, by lapse of time and the fuller development and exploration of the mineral districts, the statute has outlived its usefulness to a large extent. The court can not, by reason of the supposed necessities of the case, extend the right granted by the act beyond the clear meaning and intent of the words used. It is very likely that the fact that the opportunity to cut timber upon mineral lands had become greatly limited had much to do with the extension of the timber and stone act in 1892 to Idaho and other public-land States (27 Stat., 348).

The judgment of the Circuit Court of Appeals should be reversed.

WILLIAM R. HARR,
Assistant Attorney-General.

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UNITED STATES *v.* PLOWMAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 96. Argued January 20, 21, 1910.—Decided February 21, 1910.

The authority for cutting timber from the public domain under the act of June 3, 1878, c. 150, 20 Stat. 88, extends only to lands valuable for minerals and not to lands adjacent thereto and not actually valuable for minerals.

Although the purpose of a statute may be defeated by its qualifications, courts, in construing it, are bound by words that are explicit and unmistakable in meaning.

151 Fed. Rep. 1022, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover the value of timber cut from the public domain in Idaho. The defendant justifies under the act of June 3, 1878, c. 150. 20 Stat. 88. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain States and Territories, including Idaho, "and all other mineral districts of the United States," to cut "for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, such lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry" in the State, Territory, or district of their residence. This authority is given subject to regulation by the Secretary of the Interior for the protection of the timber

and undergrowth, and is not given to railroads. The only question before us is how far the authority extends with reference to the specific land upon which the wood is cut.

There was a trial by jury and the issue is exhibited sufficiently by a passage or two from the charge, and the instructions asked on behalf of the Government but refused. The passages from the charge are as follows: "The law cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim." . . . "The law includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts." . . . "Take, for instance, a large section of country. . . . There in the lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground." . . . "The question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant." The Government asked for instructions that it was not sufficient to show that the land in question was adjacent to lands valuable for mineral purposes, but that the authority given by the act extended only to lands valuable for minerals. It is needless to set them forth at length. There was a verdict and judg-

ment for the defendant. The ruling and refusals were excepted to, but the exceptions were overruled and the judgment affirmed by the Circuit Court of Appeals, 151 Fed. Rep. 1022, *S. C.*, 81 C. C. A. 682, on the authority of *United States* v. *Basic Co.*, 121 Fed. Rep. 504, and *United States* v. *Rossi*, 133 Fed. Rep. 380. The case then was brought to this court.

The instructions appear to us to have paid too little regard to the words of the act, defining the land on which it permits timber to be cut as "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." As was said in *Northern Pacific R. R. Co.* v. *Lewis*, 162 U. S. 366, 376, "The right to cut is exceptional and quite narrow," and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands "valuable for minerals" or containing "valuable mineral deposits." Rev. Stats., §§ 2318, 2319, 2302. See § 2320. The matter was much discussed in *Davis* v. *Weibbold*, 139 U. S. 507, and there it was said that the exceptions of mineral land from preëmption and settlement, etc., "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant," p. 519. A Land Department rule is quoted, with seeming approval, that "if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver," pp. 521, 522, citing *United States* v. *Reed*, 12 Sawy. 99, 104. Again it was said, "the exception of mineral lands from grant in the Acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction," p. 524. These are the tests to which the act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for

minerals a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, have been in accord with our opinion and the language of the act.

Judgment reversed.

MR. JUSTICE MCKENNA dissents.